MANUAL OF

MODEL CIVIL

JURY INSTRUCTIONS

FOR THE

DISTRICT COURTS

OF THE EIGHTH CIRCUIT

(April 2001)

CITE THIS WORK

8TH CIR. CIVIL JURY INSTR. 4.51 (2001)

or

8TH CIR. CIVIL JURY INSTR. 4.51 comment (2001)

COMMITTEE ON MODEL JURY INSTRUCTIONS
EIGHTH CIRCUIT

CHAIRMAN: Hon. Scott O. Wright
United States Senior District Judge
8662 U.S. Courthouse
400 E. Ninth Street
Kansas City, Missouri 64106
(816) 512-5700
(816) 512-5713 (fax)

MEMBERS:

Hon. Richard H. Battey
United States Senior District Judge
260 Federal Building
5l5 Ninth Street
Rapid City, S.D. 57701
(605) 343-7784
(605) 343-1169 (fax)

Hon. Patrick A. Conmy
United States Senior District Judge
411 U.S. Courthouse
P.O. Box 1578
Bismarck, N.D. 58502-1578
(701) 530-2315
(701) 530-2325

Hon. Michael J. Davis
United States District Judge
14-E U.S. Courthouse
300 S. Fourth Street
Minneapolis, Minnesota 55415
(612) 664-5070
(612) 664-5077 (fax)

Hon. Richard H. Kyle
United States District Judge
764 WEB Federal Building
316 N. Robert Street
St. Paul, Minnesota 55101
(651) 848-1160
(651) 848-1162 (fax)

Hon. William A. Knox
United States Magistrate Judge
204 U.S. Courthouse
131 West High Street
Jefferson City, Missouri 65101
(573) 634-3418
(573) 636-5208 (fax)

Hon. Nanette K. Laughrey
United States District Judge
7452 U.S. Courthouse
400 E. Ninth Street
Kansas City, Missouri 64106
(816) 512-5675
(816) 512-5688 (fax)

Hon. Michael J. Melloy
United States District Judge
304 U.S. Courthouse
P.O. Box 74410
Cedar Rapids, Iowa 52401
(319) 286-2330
(319) 286-2331 (fax)

Hon. James M. Moody
United States District Judge
318 U.S. Courthouse
600 W. Capitol
Little Rock, Arkansas 72201
(501) 604-5150
(501) 604-5373 (fax)

Hon. Catherine D. Perry
United States District Judge
14.182 U.S. Courthouse
111 S. Tenth Street
St. Louis, Missouri 63102
(314) 244-7520
(314) 244-7529 (fax)

Hon. Warren K. Urbom
United States Senior District Judge
507 Federal Building
100 Centennial Mall North
Lincoln, Nebraska 68508
(402) 437-5231
(402) 437-5690 (fax)

Hon. Harold D. Vietor
United States Senior District Judge
221 U.S. Courthouse
123 E. Walnut Street
Des Moines, Iowa 50309
(515) 284-6237
(515) 284-6460 (fax)

Hon. William R. Wilson, Jr.
United States District Judge
423 U.S. Courthouse
600 W. Capitol
Little Rock, Arkansas 72201
(501) 604-5140
(501) 324-6869 (fax)

SUBCOMMITTEE ON MODEL CIVIL JURY INSTRUCTIONS
EIGHTH CIRCUIT

CHAIRMAN:

Hon. William A. Knox
United States Magistrate Judge
204 U.S. Courthouse
131 West High Street
Jefferson City, Mo. 65101
(573) 634-3418
(fax) 636-5208

MEMBERS:

Dennis E. Egan, Esq.
The Popham Law Firm, P.C.
922 Walnut Street, 10th Floor
Kansas City, Mo. 64106
(816) 221-2288
(fax) 221-3999

Brian C. Fries, Esq.
Lathrop & Gage L.C.
2345 Grand Boulevard, Suite 2800
Kansas City, Mo. 64108
(816) 460-5326
(fax) 292-2001

Gaynell Gallagher, Esq.
Husch & Eppenberger
100 N. Broadway
St. Louis, Missouri 63102
(314) 622-0663
(fax) 421-0239

William C. Martucci, Esq.
Shook, Hardy & Bacon
1200 Main Street
Kansas City, Missouri 64105
(816) 474-6550
(fax) 421-4066

Martin M. Meyers, Esq.
2850 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 421-4040
(fax) 421-4020

Hon. John T. Maughmer
United States Magistrate Judge
7762 U.S. Courthouse
400 E. Ninth Street
Kansas City, Missouri 64106
(816) 512-5745
(fax) 512-5758

Kelly A. McCaffrey, Esq.
517 U.S. Courthouse
500 State Avenue
Kansas City, Kansas 66101
(913) 551-6740
(fax) 551-6513

Hon. David D. Noce
United States Magistrate Judge
111 S. Tenth Street, 17 North
St. Louis, Missouri 63102
(314) 244-7630
(fax) 244-7639

Larry M. Schumaker, Esq.
Shook, Hardy & Bacon
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
(816) 474-6550
(fax) 421-4066

INTRODUCTION

These model instructions have been prepared to help judges communicate more effectively with juries. The Manual is meant to provide judges and lawyers with models of clear, brief and simple instructions calculated to maximize juror comprehension. They are not intended to be treated as the only method of instructing properly a jury. *See United States v. Ridinger*, 805 F.2d 818, 821 (8th Cir. 1986). "The Model Instructions, . . . are not binding on the district courts of this circuit, but are merely helpful suggestions to assist the district courts." *United States v. Norton*, 846 F.2d 521, 525 (8th Cir. 1988).

Every effort has been made to assure conformity with current Eighth Circuit law; however, it cannot be assumed that all of these model instructions in the form given necessarily will be appropriate under the facts of a particular case. The Manual covers issues on which instructions are most frequently given, but because each case turns on unique facts, instructions should be drafted or adapted to conform to the facts in each case.

In drafting instructions, the Committee has attempted to use simple language, short sentences, and the active voice and omit unnecessary words. We have tried to use plain language because giving the jury the statutory language, or language from appellate court decisions, is often confusing.

It is our position that instructions should be as brief as possible and limited to what the jury needs to know for the case. We also recommend sending a copy of the instructions as given to the jury room.

Counsel are reminded of the dictates of Civil Rule 51 which provides "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

The Committee expresses its appreciation to all members of the subcommittee, whose diligent research and commitment to this project are essential in continuing to revise current instructions and draft new ones. Special thanks must go to Kay Bode, secretary to the Honorable William A. Knox, who has typed, retyped, corrected, edited and revised the drafts on numerous occasions. Her dedication to detail, careful screening of drafts, and comparison of various drafts have been essential in the production of these instructions.

HOW TO USE THESE INSTRUCTIONS

These civil jury instructions have been arranged with an awareness that judges follow different practices when it comes to jury instructions. Some judges send a full set of written instructions into the jury room after they have been read in open court. Other judges also provide jurors with written copies of the instructions to follow as they are read from the bench. Still other judges prefer not to provide the jury with any written instructions. These civil jury instructions have been arranged and drafted to accommodate any of these varying practices.

Model Instruction 1.01 is a general instruction which is intended to give jurors an overview of their duties and trial procedures during the trial. It should be given at the commencement of the trial (after the jurors are sworn and before opening statements). Model Instruction 1.01 incorporates matters which are also addressed in Model Instructions 3.02 (Judge's Opinion) and 3.03 (Credibility of Witnesses). The Committee recommends that the general instructions which are given at the outset of the trial (Model Instructions 1.01 - 1.06) and those given during the middle of trial should not be repeated at the time the case is submitted to the jury, and should not be sent in writing to the jury room. Those general matters which are necessary to the jury's final deliberations are again repeated in Model Instructions 2.01 - 2.11, and 3.01 - 3.07.

The Committee recognizes that varying burden-of-proof formulations are used in different jurisdictions. Judges and lawyers often are accustomed to using the burden-of-proof instruction found in the pattern civil jury instructions adopted by their particular states. Model Instruction 3.04 is a burden-of-proof instruction which is intended to accommodate the various formulations. However, the Committee recognizes that a judge may prefer to use the burden-of-proof formulation which is accepted in his or her state. If such a burden-of-proof instruction is used, the element/issue instructions must be modified accordingly.

The Committee recommends that written instructions which are to be sent into the jury room should be numbered, in the order given, or accurately titled without numbering. If a "titling" method is used, the judge should be aware that the titles used in these instructions were not designed for such use and that an appropriately "neutral" method of expression should be used. Such instructions should also be free of any extraneous notations: for example, the model instruction number, the identity of the submitting party, committee notes, any notes by the court, and other such notations, should not appear on the written instructions given to the jury.

TABLE OF CONTENTS

1. PRELIMINARY INSTRUCTIONS FOR USE AT COMMENCEMENT OF TRIAL - Introductory Comment 1
1.01 GENERAL: NATURE OF CASE; BURDEN OF PROOF; DUTY OF JURY; CAUTIONARY 2
1.02 EVIDENCE; LIMITATIONS 4
1.03 BENCH CONFERENCES AND RECESSES 6
1.04 NO TRANSCRIPT AVAILABLE [NOTE-TAKING] 7
1.04A QUESTIONS BY JURORS 9
1.05 CONDUCT OF THE JURY 11
1.06 OUTLINE OF TRIAL 13

2. INSTRUCTIONS FOR USE DURING TRIAL - Introductory Comment 14
2.01 DUTIES OF JURY: RECESSES 15
2.02 STIPULATED TESTIMONY 17
2.03 STIPULATED FACTS 18
2.04 JUDICIAL NOTICE 19
2.05 TRANSCRIPT OF TAPE-RECORDED CONVERSATION 20
2.06 PREVIOUS TRIAL 21
2.07 CROSS-EXAMINATION OF PARTY'S CHARACTER WITNESS 22
2.08A EVIDENCE ADMITTED AGAINST ONLY ONE PARTY 23
2.08B EVIDENCE ADMITTED FOR LIMITED PURPOSE 24
2.09 IMPEACHMENT OF WITNESS, PRIOR CONVICTION 25
2.10 SUMMARIES OF RECORDS AS EVIDENCE - Commentary 26
2.11 WITHDRAWAL 27

3. INSTRUCTIONS FOR USE AT CLOSE OF TRIAL - Introductory Comment 28
3.01 EXPLANATORY 29
3.02 JUDGE'S OPINION 30
3.03 CREDIBILITY OF WITNESSES 31
3.04 BURDEN OF PROOF 34
3.05 WITHDRAWAL (OF CLAIM) 36
3.06 ELECTION OF FOREPERSON; DUTY TO DELIBERATE; COMMUNICATIONS WITH COURT; CAUTIONARY; UNANIMOUS VERDICT; VERDICT FORM 37
3.07 "ALLEN" CHARGE TO BE GIVEN AFTER EXTENDED DELIBERATION 39

4. CIVIL RIGHTS - ELEMENT AND DAMAGE INSTRUCTIONS - Introductory Comment 42
4.10 EXCESSIVE USE OF FORCE - ARREST OR OTHER SEIZURE OF PERSON - BEFORE CONFINEMENT - FOURTH AMENDMENT 43
4.20 EXCESSIVE USE OF FORCE - PRETRIAL DETAINEES - FIFTH AND FOURTEENTH AMENDMENTS 46
4.30 EXCESSIVE USE OF FORCE - CONVICTED PRISONERS - EIGHTH AMENDMENT 49
4.31 DENIAL OF MEDICAL CARE - CONVICTED PRISONERS* - 42 U.S.C. § 1983 52
4.32 FAILURE TO PROTECT FROM ATTACK - SPECIFIC ATTACK - CONVICTED PRISONERS - EIGHTH AMENDMENT 55
4.40 DEFINITION: COLOR OF STATE LAW - 42 U.S.C. § 1983 57
4.42 DEFINITION: PERVASIVE RISK OF HARM - CONVICTED PRISONERS - 42 U.S.C. § 1983 58
4.43 DEFINITION: SERIOUS MEDICAL NEED - CONVICTED PRISONERS - 42 U.S.C. § 1983 59
4.44 DEFINITION: DELIBERATE INDIFFERENCE - CONVICTED PRISONERS - 42 U.S.C. § 1983 . . 60
4.45 DEFINITION: MALICIOUSLY 61
4.46 DEFINITION: SADISTICALLY 62
4.51 ACTUAL DAMAGES - PRISONER CIVIL RIGHTS 63
4.52 NOMINAL DAMAGES - PRISONER CIVIL RIGHTS 65
4.53 PUNITIVE DAMAGES - CIVIL RIGHTS 66
4.54 et seq. (Reserved for Future Use) 68

4.60 VERDICT FORM - ONE PLAINTIFF, TWO DEFENDANTS, ONE INJURY CASE 69

5. EMPLOYMENT CASES - ELEMENT AND DAMAGE INSTRUCTIONS - Overview 71
5.00 DISPARATE TREATMENT CASES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE CIVIL RIGHTS ACT OF 1991 Introductory Comment 74
5.01 TITLE VII - DISPARATE TREATMENT - ESSENTIAL ELEMENTS 75
5.01A TITLE VII - DISPARATE TREATMENT - "SAME DECISION" INSTRUCTION 77
5.02 TITLE VII - DISPARATE TREATMENT - ACTUAL DAMAGES 78
5.03 TITLE VII - DISPARATE TREATMENT - NOMINAL DAMAGES 82
5.04 TITLE VII - DISPARATE TREATMENT - PUNITIVE DAMAGES 83
5.05 TITLE VII - DISPARATE TREATMENT - VERDICT FORM 86
5.10 DISPARATE TREATMENT CASES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA") - Introductory Comment 88
5.11 ADEA - DISPARATE TREATMENT - ESSENTIAL ELEMENTS (Mixed Motive Case) 89
5.12 ADEA - DISPARATE TREATMENT - ACTUAL DAMAGES 91
5.13 ADEA - DISPARATE TREATMENT - NOMINAL DAMAGES 94
5.14 ADEA - DISPARATE TREATMENT - WILLFULNESS 95
5.15 ADEA - DISPARATE TREATMENT - VERDICT FORM 96
5.20 RACE DISCRIMINATION CASES UNDER 42 U.S.C. § 1981 - Introductory Comment 97
5.21 42 U.S.C. § 1981 - RACE DISCRIMINATION - ESSENTIAL ELEMENTS (Mixed Motive Case) . . . 98
5.22 42 U.S.C. § 1981 - RACE DISCRIMINATION - ACTUAL DAMAGES 100
5.23 42 U.S.C. § 1981 - RACE DISCRIMINATION - NOMINAL DAMAGES 103
5.24 42 U.S.C. § 1981 - RACE DISCRIMINATION - PUNITIVE DAMAGES 104
5.25 42 U.S.C. § 1981 - RACE DISCRIMINATION - VERDICT FORM 106
5.30 DISCRIMINATION BY PUBLIC EMPLOYERS UNDER 42 U.S.C. § 1983 - Introductory Comment 108
5.31 42 U.S.C. § 1983 - ESSENTIAL ELEMENTS (Mixed Motive Case) 109
5.32 42 U.S.C. § 1983 - ACTUAL DAMAGES 111
5.33 42 U.S.C. § 1983 - NOMINAL DAMAGES 114
5.34 42 U.S.C. § 1983 - PUNITIVE DAMAGES 115
5.35 42 U.S.C. § 1983 - VERDICT FORM 116
5.40 SEXUAL HARASSMENT CASES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE CIVIL RIGHTS ACT OF 1991 - Introductory Comment 118
5.41 SEXUAL HARASSMENT -- ESSENTIAL ELEMENTS - (By Supervisor With Tangible Employment Action) 120
5.42 SEXUAL HARASSMENT -- ESSENTIAL ELEMENTS (By Supervisor With No Tangible Employment Action) 123
5.42(A) AFFIRMATIVE DEFENSE (For Use in Cases With No Tangible Employment Action) 128
5.43 SEXUAL HARASSMENT-- ESSENTIAL ELEMENTS (By Nonsupervisor With No Tangible Employment Action) 129
5.50 DISPARATE TREATMENT AND REASONABLE ACCOMMODATION CASES UNDER THE AMERICANS WITH DISABILITIES ACT (“ADA”) (Employment Cases Only) Introduction 132
5.51A ADA - DISPARATE TREATMENT - ESSENTIAL ELEMENTS (ACTUAL DISABILITY) 142
5.51B ADA-- DISPARATE TREATMENT - ESSENTIAL ELEMENTS (PERCEIVED DISABILITY) . . 145
5.51A/B(1) ADA--DISPARATE TREATMENT “SAME DECISION” INSTRUCTION 148
5.51C ADA - REASONABLE ACCOMMODATION CASES (Specific Accommodation Identified) 149
5.52A DISABILITY 153
5.52B ESSENTIAL FUNCTIONS 154
5.52C SUBSTANTIALLY LIMITS 156
5.53A "UNDUE HARDSHIP" -- STATUTORY DEFENSE 159
5.53B "DIRECT THREAT" -- STATUTORY DEFENSE 161
5.54 ACTUAL DAMAGES 163
5.55 NOMINAL DAMAGES 167

5.56 PUNITIVE DAMAGES 168
5.57 "GOOD FAITH" DEFENSE TO COMPENSATORY AND PUNITIVE DAMAGES 171
5.58 BUSINESS JUDGMENT INSTRUCTION 172
5.59 CONSTRUCTIVE DISCHARGE INSTRUCTION 173
5.60 *et seq.* (Reserved for "Reasonable Accommodation" Cases under the Americans with Disabilities Act, 42 U.S.C. § 12101) 174
5.70 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - Introductory Comment 175
5.71 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - ESSENTIAL ELEMENTS 176
5.71A 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - SPECIAL INTERROGATORIES REGARDING "PROTECTED SPEECH" BALANCING ISSUES 182
5.72 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - ACTUAL DAMAGES 185
5.73 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - NOMINAL DAMAGES 188
5.74 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - PUNITIVE DAMAGES 189
5.75 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - VERDICT FORM 190
5.75A 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - SPECIAL INTERROGATORIES ON "BALANCING" ISSUES 192
5.80 CASES UNDER THE FAMILY AND MEDICAL LEAVE ACT (FMLA) - Introduction 194
5.81A FMLA – Wrongful Termination – Essential Elements (employee with a serious health condition) . . 199
5.81B FMLA – Wrongful Termination – Essential Elements (employee needed to care for spouse, parent, son or daughter with a serious health condition 201
5.81C FMLA – Wrongful Termination – Essential Elements (employee leave for birth, adoption or foster care 203
5.81D FMLA – Failure to Reinstate – Essential Elements (employee with a serious health condition) 205
5.81E FMLA – Failure to Reinstate -- Essential Elements (employee needed to care for a spouse, son or daughter with a serious health condition 207
5.81F FMLA – Failure to Reinstate -- Essential Elements (employee leave for birth, adoption or foster care 209
5.82 FMLA – "Same Decision" Instruction 211
5.83A FMLA – Definition: "Needed to Care For" 212
5.83B FMLA – Definition: "Serious Health Condition" 213
5.83C FMLA — Definition: "Serious Health Condition" (alternate) 214
5.83D FMLA — Definition: "Health Care Provider" 216
5.83E FMLA — Definition: "Appropriate Notice" – Leave Foreseeable 217
5.83F FMLA — Definition: "Appropriate Notice" – Leave Unforeseeable 218
5.83G FMLA — Definition: "Equivalent Position" 219
5.84 FMLA – Exception to Job Restoration (key employee) 220
5.84A FMLA – Exception to Job Restoration (employee would not have been employed at time of reinstatement) 221
5.85 FMLA – Actual Damages 222
5.86 FMLA – Good Faith Defense to Liquidated Damages 224
5.90 MISCELLANEOUS INSTRUCTIONS AND SPECIAL INTERROGATORIES 225
5.91 DISPARATE TREATMENT CASES - PRETEXT/INDIRECT EVIDENCE INSTRUCTION - ESSENTIAL ELEMENTS 226
5.92 SPECIAL INTERROGATORIES TO ELICIT FINDINGS IN BORDERLINE PRETEXT/MIXED-MOTIVE CASES 229
5.93 CONSTRUCTIVE DISCHARGE INSTRUCTION 235
5.94 BUSINESS JUDGMENT INSTRUCTION - TITLE VII CASES 237
5.95 PRETEXT INSTRUCTION 238
5.96 DEFINITION OF MOTIVATING FACTOR 240
5.97 AFTER-ACQUIRED EVIDENCE 242
5.97A MODIFIED VERDICT FORM IN AFTER-ACQUIRED EVIDENCE CASES 244

6. FRAUD CASES - ELEMENT AND DAMAGE INSTRUCTIONS 247
6.01 FRAUD - ODOMETER 248
6.51 ODOMETER FRAUD - DAMAGES 250

7 FEDERAL EMPLOYERS' LIABILITY ACT
Introduction 251
7.01 GENERAL F.E.L.A. NEGLIGENCE 255
7.02 DEFENSE THEORY INSTRUCTIONS - THREE OPTIONS 259
7.02A DEFENSE THEORY INSTRUCTIONS - FAILURE OF PROOF ON ANY ELEMENT OF PLAINTIFF'S CASE LISTED IN THE ELEMENTS INSTRUCTION 261
7.02B DEFENSE THEORY INSTRUCTIONS - FAILURE TO PROVE ANY FACT ESSENTIAL TO PLAINTIFF'S RIGHT TO RECOVER 263
7.02C DEFENSE THEORY INSTRUCTIONS - AFFIRMATIVE DEFENSES 266
7.03 F.E.L.A CONTRIBUTORY NEGLIGENCE 268
7.04 F.E.L.A. BOILER INSPECTION ACT VIOLATION 270
7.05 F.E.L.A. SAFETY APPLIANCE ACT VIOLATION 274
7.06A F.E.L.A. DAMAGES - INJURY TO EMPLOYEE 278
7.06B F.E.L.A. DAMAGES - DEATH OF EMPLOYEE 281
7.06C F.E.L.A. DAMAGES - PRESENT VALUE OF FUTURE LOSS 284
7.06D F.E.L.A. DAMAGES - INCOME TAX EFFECTS OF AWARD 285
7.07 (Reserved for Future Use) 286
7.08 FORM OF VERDICT - CONTRIBUTORY NEGLIGENCE SUBMITTED 287
7.08A FORM OF VERDICT - CONTRIBUTORY NEGLIGENCE NOT SUBMITTED 290
7.09 DEFINITION OF TERM "NEGLIGENT" OR "NEGLIGENCE" 291
7.10 DEFINITION OF THE TERM "ORDINARY CARE" 292
7.11 DEFINITIONS OF THE TERMS "NEGLIGENT" OR "NEGLIGENCE" AND "ORDINARY CARE" COMBINED 293

8. DEFINITIONS 294
8.01 AGENCY 295

1. PRELIMINARY INSTRUCTIONS FOR USE AT COMMENCEMENT OF TRIAL

Introductory Comment

These preliminary instructions should be read to the jury at the commencement of trial. They need not be submitted in written form even if other instructions are given in written form at the time the case is submitted to the jury.

Preliminary Instructions for Use at Commencement of Trial

1.01 GENERAL: NATURE OF CASE; BURDEN OF PROOF; DUTY OF JURY; CAUTIONARY

Ladies and gentlemen: I will take a few moments now to give you some initial instructions about this case and about your duties as jurors. At the end of the trial I will give you further instructions. I may also give you instructions during the trial. Unless I specifically tell you otherwise, all such instructions - both those I give you now and those I give you later - are equally binding on you and must be followed.

This is a civil case brought by the plaintiff[s] against the defendant[s]. The plaintiff[s] allege[s] that the defendant[s] _____.[1] The defendant[s] deny[ies] that allegation. [If defendant has a counterclaim or affirmative defense, it should be stated here.] It will be your duty to decide from the evidence whether the plaintiff[s] is [are] entitled to a verdict against defendant[s].[2]

From the evidence you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and experiences in the affairs of life. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, or only part of it, or none of it.

In deciding what testimony to believe, consider the witnesses' intelligence, their opportunity to have seen or heard the things they testify about, their memories, any motives they may have for testifying a certain way, their manner while testifying, whether they said something different at an earlier time, the general reasonableness of their testimony and the extent to which their testimony is consistent with other evidence that you believe.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

Preliminary Instructions for Use at Commencement of Trial

Notes on Use

1. A short, simple statement of the matter in controversy should be stated here.

2. If there are multiple parties, this can be revised as follows:

   > It will be your duty to decide from the evidence whether a party is entitled to a verdict against another party.

Preliminary Instructions for Use at Commencement of Trial

1.02 EVIDENCE; LIMITATIONS

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses; documents and other things received as exhibits; any facts that have been stipulated - that is, formally agreed to by the parties; [and any facts that have been judicially noticed - that is facts which I say you must accept as true.][1]

Certain things are not evidence. I will list those things for you now:

1. Statements, arguments, questions and comments by lawyers are not evidence.

2. Exhibits that are identified by a party but not offered or received in evidence are not evidence.

3 . Objections are not evidence. Lawyers have a right and sometimes an obligation to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question or an exhibit, you must ignore the question or the exhibit and must not try to guess what the information might have been.

4 . Testimony and exhibits that I strike from the record, or tell you to disregard, are not evidence and must not be considered.

5. Anything you see or hear about this case outside the courtroom is not evidence[, unless I specifically tell you otherwise during the trial].

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I will tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used. [You should also pay particularly close attention to such an instruction, because it may not be available to you in writing later in the jury room.][2]

Finally, some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms, since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

Preliminary Instructions for Use at Commencement of Trial

Notes on Use

1. In many cases, the judge is not requested to take judicial notice of facts. Therefore, this phrase is left as an option for the situations in which the judge either anticipates that the court will be called upon to take judicial notice of facts, or in which the judge routinely prefers to advise the jury of the effect of judicial notice. The judge may want to wait to instruct the jury about the effect of judicial notice until such time judicial notice is taken of a particular fact. *See infra* Model Instruction 2.04.

2. For optional use in those cases where the final instructions are to be sent to the jury room. The need for a limiting instruction, of course, often arises without prior warning, making the submission of a formal, written instruction impractical.

1.03 BENCH CONFERENCES AND RECESSES

During the trial it may be necessary for me to speak with the lawyers out of your hearing, either by having a bench conference here while you are present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence which govern the trial, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

Preliminary Instructions for Use at Commencement of Trial

1.04 NO TRANSCRIPT AVAILABLE [NOTE-TAKING]

At the end of the trial you must make your decision based on what you recall of the evidence. You will not have a written transcript to consult. You must pay close attention to the testimony as it is given.

[If you wish, however, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. And do not let note-taking distract you so that you do not hear other answers by the witness.] The Clerk will provide each of you with a pad of paper and a pen or pencil. At each recess, leave them _____.[1]

[When you leave at night, your notes will be secured and not read by anyone.][2]

Committee Comments

Both the unbracketed and bracketed portions of this instruction are optional. The unbracketed portion may help keep jurors attentive and may discourage requests for lengthy readbacks of testimony. The practice of restricting the reading back of testimony is discretionary. *United States v. Ratcliffe*, 550 F.2d 431, 434 (9th Cir. 1976).

There is some controversy over the subject of juror note-taking. *See United States v. Darden*, 70 F.3d 1507, 1536-37 (8th Cir. 1995). It is within the discretion of the trial judge to permit the practice. *United States v. Anthony*, 565 F.2d 533, 536 (8th Cir. 1977), *cert. denied*, 434 U.S. 1079 (1978); *United States v. Rhodes*, 631 F.2d 43, 45 (5th Cir. 1980).

If note-taking is permitted, an instruction should be given concerning the use of notes during deliberations. *United States v. Rhodes*, 631 F.2d at 46 n.3.

See 9th Cir. Crim. Jury Instr. 1.10 and 1.11 (2000). *See also* 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil §§ 101.13, 101.14 (5th ed. 2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 8 (1988) *U.S. Eleventh Circuit Pattern Jury Instructions - Civil Cases*, Preliminary Instructions Before Trial (West 1990); *United States v. Rhodes*, 631 F.2d at 46 n.3. *See generally* West Key # "Criminal Law" 855(1).

This instruction is similar to *8th Cir. Crim. Jury Instr.* 1.06 (2000)

Notes on Use

1. Tell jurors where their notes are to be left.

2. The court may wish to describe the method to be used for safekeeping. In a high profile case, the court may want to give some additional cautionary instructions.

Preliminary Instructions for Use at Commencement of Trial

1.04A QUESTIONS BY JURORS[1]

[When attorneys have finished their examination of a witness, you may ask questions of the witness (describe procedure to be used here).[2] If the rules of evidence do not permit a particular question, I will so advise you. Following your questions, if any, the attorneys may ask additional questions.]

Committee Comments

Some judges permit jurors to ask questions of witnesses during the course of both civil and criminal trials. The advantage of this practice is that jurors become more involved in the trial proceedings and are permitted to address their particular concerns with respect to the issues. *See* Hener and Penrod, *Increasing Jurors' Participation with Jury Notetaking and Question Asking*, 12 Law & Human Behavior 231 (1988). *See United States v. Johnson*, 914 F.2d 136 (8th Cir. 1990) for a summary of Eighth Circuit opinions on the subject. The court applied their typical "abuse of discretion" standard of review to questions to which objections were made and the "plain error" rule to questions to which no objections were made. Some perceive dangers in the practice and have criticized it. *See United States v. Johnson*, 892 F.2d 707 (8th Cir. 1989) (concurrence by Lay, Chief Judge); *United States v. Land*, 877 F.2d 17, 19 (8th Cir. 1989); *United States v. Polowichak*, 783 F.2d 410, 413 (4th Cir. 1986); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1985). The decision to permit questions by jurors, and the procedures employed to control such questions, should be left to the sound discretion of the trial judge. Although the Committee makes no recommendation on whether jurors should be allowed to question witnesses, the Eighth Circuit strongly discouraged the procedure. The court, in *United States v. Welliver*, 976 F.2d 1148 (8th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993), stated: "[n]evertheless, we state once again that we have strong concerns about juror questioning of witnesses. . . . (Citations omitted.) These decisions in which seven, now eight, of the judges of this court have joined make it evident that juror interrogation of witnesses presents substantial risk of reversal and retrial. Where a record is properly made and the record permits a conclusion that prejudice occurred, this will be the inevitable result."

Notes on Use

1. This instruction may be used if the court permits questioning of witnesses by jurors. Various procedures have been used for handling jurors' questions. Some judges require that the questions be in writing, while others permit the jurors to state their questions orally. The procedure employed for taking jurors' questions, considering objections, and posing the questions should be left to the discretion of the judge. The jury should be advised of the procedure to be used.

2. Different methods have been used. For example:

(1) When attorneys have finished their examination of a witness, you may submit a written question or questions if you have not understood something. I will review each question with the attorneys. You may not receive an answer to your question because I may decide that the question is not proper under the rules of evidence. Even if the question is proper, you may not get an immediate answer to your question. For instance, a later witness or an exhibit you will see later in the trial may answer your question.

(2) Most of the testimony will be given in response to questions by the attorneys. Sometimes I may ask questions of a witness. When the attorneys have finished their questioning of a witness and I have finished mine, I shall ask you whether you have any questions for that witness. If you do, direct each of your questions to me, and if I decide that it meets the legal rules, I shall ask it of the witness. After all your questions for a witness have been dealt with, the attorneys will have an opportunity to ask the witness further about the subjects raised by your questions. When you direct questions to me to be asked of the witness, you may state them either orally or in writing.

(3) The court will permit jurors to submit written questions during the course of the trial. Such questions must be submitted to the court, but, depending upon the court's ruling on the questions, the court may not submit them to the witness. The court will endeavor to permit such questions at the conclusion of a witness' testimony.

Preliminary Instructions for Use at Commencement of Trial

1.05 CONDUCT OF THE JURY

Finally, to insure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it [until the trial has ended and your verdict has been accepted by me]. If someone should try to talk to you about the case [during the trial], please report it to me.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case - you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side - even if it is simply to pass the time of day - an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator or the like, remember it is because they are not supposed to talk or visit with you either.

Fifth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it. [In fact, until the trial is over I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any TV or radio newscasts at all. I do not know whether there might be any news reports of this case, but if there are you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case, you will know more about the matter than anyone will learn through the news media.][1]

Sixth, do not do any research (including research in the dictionary) or make any investigation about the case on your own.

Seventh, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

Committee Comments

A similar instruction should be repeated before the first recess, and as needed before other recesses (for example, before a weekend recess). *See infra* Model Instruction 2.01 for a form of instruction before recesses. *See also* instructions relating to recesses.

See 9th Cir. Crim. Jury Instr. 1.9 (2000); 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 101.11 (5th ed. 2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 1 (1988). *See generally* West Key # "Criminal Law" 1174(1) for cases on the conduct and deliberations of the jury.

Notes on Use

1. Optional for those cases in which media coverage is expected.

Preliminary Instructions for Use at Commencement of Trial

1.06 OUTLINE OF TRIAL

The trial will proceed in the following manner:

First, the plaintiff[s]'s attorney may make an opening statement. Next, the defendant[s]'s attorney may make an opening statement. An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

The plaintiff[s] will then present evidence and counsel for defendant[s] may cross-examine. Following the plaintiff[s] case, the defendant may present evidence and plaintiff[s]'s counsel may cross-examine.

After presentation of evidence is completed, the attorneys will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. The court will instruct you further on the law. After that you will retire to deliberate on your verdict.

Committee Comments

See 9th Cir. Crim. Jury Instr. 1.12 (2000); Federal JudicialCenter, *Pattern Criminal Jury Instructions* 1 (1988); 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 101.02 (5th ed. 2000).

2. INSTRUCTIONS FOR USE DURING TRIAL
Introductory Comment

Instructions contained in this section may be read to the jury during the course of the trial. They are not generally intended for submission in written form at the conclusion of the case, although there is no particular reason why, in appropriate circumstances, they could not be submitted to the jury as part of the written package. Generally, they will not be reread to the jury at the conclusion of the case, although the court has discretion to do so.

Instructions for Use During Trial

2.01 DUTIES OF JURY: RECESSES[1]

We are about to take [our first] [a] recess and I remind you of the instruction I gave you earlier. During this recess or any other recess, you must not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone tries to talk to you about the case, please let me know about it immediately. [Do not read, watch or listen to any news reports of the trial.][2] Finally, keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

I may not repeat these things to you before every recess, but keep them in mind throughout the trial.[3]

Committee Comments

The court has considerable discretion to allow the jury to go home or separate before it has reached a verdict. *United States v. Williams*, 635 F.2d 744, 745 (8th Cir. 1980) and cases cited therein. However, the jury must be admonished as to their duties and responsibilities when not in court. Such an instruction may be given at the beginning of trial, before recesses and lunch time, and most importantly, before separating for the evening. *Id.* Although failure to give any instruction of this nature during the course of a trial which was completed in one day has been held harmless error, *Morrow v. United States*, 408 F.2d 1390 (8th Cir. 1969), it is prejudicial error to allow the jury to separate overnight without a cautionary instruction having been given at any stage of the trial prior to separation. *Williams*, 635 F.2d at 746. However, the failure to give a cautionary instruction prior to an overnight separation was held not reversible error, absent any other claim of prejudice where the jury had been so cautioned on at least thirteen other occasions. *United States v. Weatherd*, 699 F.2d 959, 962 (8th Cir. 1983). *See also United States v. McGrane*, 746 F.2d 632 (8th Cir. 1984) holding that the jury was adequately cautioned when they were so instructed on ten occasions.

See 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.01 (5th ed. 2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 5 (1988); *9th Cir. Crim. Jury Instr.* 2.1 (2000).

Notes on Use

1. This instruction should be given before the first recess and at subsequent recesses within the discretion of the court.

2. This language should be modified for overnight or weekend recesses.

[3] This language may be omitted for subsequent breaks during trial, but not for overnight or weekend recesses.

Instructions for Use During Trial

2.02 STIPULATED TESTIMONY

The plaintiff[s] and the defendant[s] have stipulated - that is, they have agreed - that if _____ were called as a witness he [she] would testify in the way counsel have just stated. You should accept that as being _____'s testimony, just as if it had been given here in court from the witness stand.

Committee Comments

There is, of course, a difference between stipulating that a witness would give certain testimony, and stipulating that certain facts are established. *United States v. Lambert*, 604 F.2d 594, 595 (8th Cir. 1979). As to the latter kind of stipulation, *see infra* Model Instruction 2.03.

See 8th Cir. Crim. Jury Instr. 2.02 (2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 11 (1988); *9th Cir. Crim. Jury Instr.* 2.3 (2000). *See generally* West Key # "Stipulations" 1-21; "Criminal Law" 1172.1(2).

Instructions for Use During Trial

2.03 STIPULATED FACTS

The plaintiff[s] and the defendant[s] have stipulated -- that is, they have agreed -- that certain facts are as counsel have just stated. You should, therefore, treat those facts as having been proved.

Committee Comments

There is, of course, a difference between stipulating that certain facts are established, and stipulating that a witness would give certain testimony. *United States v. Lambert*, 604 F.2d 594, 595 (8th Cir. 1979). As to the latter kind of stipulation, *see infra* Model Instruction 2.02.

When parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed. *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976).

See 8th Cir. Crim. Jury Instr. 2.03 (2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 12 (1988); *9th Cir. Crim. Jury Instr.* 2.4 (2000). *See generally* West Key # "Stipulations" 1-21, "Criminal Law" 1172.1(2).

Instructions for Use During Trial

2.04 JUDICIAL NOTICE

I have decided to accept as proved the following fact[s]: _____.

You must accept [this] [these] fact[s] as proved.

Committee Comments

An instruction regarding judicial notice should be given at the time notice is taken.

Fed. R. Evid. 201(g), while permitting the judge to determine that a fact is sufficiently undisputed to be judicially noticed, also requires that the jury be instructed that it must accept as conclusive any fact judicially noticed in a civil case.

See 8th Cir. Crim. Jury Instr. 2.04 (2000); 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.20 (5th ed. 2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 7 (1988); *9th Cir. Crim. Jury Instr.* 2.5 (2000). *See generally* Fed. R. Evid. 201; West Key # "Evidence" 1-52.

Instructions for Use During Trial

2.05 TRANSCRIPT OF TAPE-RECORDED CONVERSATION

As you have [also] heard, there is a typewritten transcript of the tape recording [I just mentioned] [you are about to hear]. That transcript also undertakes to identify the speakers engaged in the conversation.

You are permitted to have the transcript for the limited purpose of helping you follow the conversation as you listen to the tape recording, and also to help you identify the speakers. The tape recording is evidence for you to consider. The transcript, however, is not evidence.

You are specifically instructed that whether the transcript correctly or incorrectly reflects the conversation or the identity of the speakers is entirely for you to decide based upon what you have heard here about the preparation of the transcript, and upon your own examination of the transcript in relation to what you hear on the tape recording. The tape recording itself is the primary evidence of its own contents. If you decide that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

Differences between what you hear in the recording and read in the transcript may be caused by such things as the inflection in a speaker's voice, or by inaccuracies in the transcript. You should, therefore, rely on what you hear rather than what you read when there is a difference.

Committee Comments

The transcript, absent stipulation of the parties, should not go to the jury room. *See United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977).

See 8th Cir. Crim. Jury Instr. 2.06 (2000); *see generally United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975); *United States v. Bentley*, 706 F.2d 1498 (8th Cir. 1983).

Instructions for Use During Trial

2.06 PREVIOUS TRIAL

You have heard evidence that there was a previous trial of this case. Keep in mind, however, that you must decide this case solely on the evidence presented to you in this trial. The fact of a previous trial should have no bearing on your decision in this case.[1]

Committee Comments

See 8th Cir. Crim. Jury Instr. 2.20 (2000); 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.42 (5th ed. 2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 14 (1988); *9th Cir. Crim. Jury Instr.* 2.14 (2000). *See generally* West Key # "Evidence" 575-83. This instruction should not be given unless specifically requested.

Notes on Use

1. The instruction should be modified if the results of the prior trial are introduced.

Instructions for Use During Trial

2.07 CROSS-EXAMINATION OF PARTY'S CHARACTER WITNESS

The questions and answers you have just heard were permitted only to help you decide if the witness really knew about _____'s[1] reputation for truthfulness.[2] The information developed on that subject may not be used by you for any other purpose.[3]

Committee Comments

See 8th Cir. Crim. Jury Instr. 2.10 (2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 52 (1988). *See generally* Fed. R. Evid. 404, 405; West Key # "Criminal Law" 673(2), "Witnesses" 274(1); and *see also Gross v. United States*, 394 F.2d 216 (8th Cir. 1968).

Notes on Use

1. Insert name of person whose character is being challenged.

2. Fed. R. Evid. 404(a) and 608 generally limit character evidence in civil cases to reputation for truth and veracity. It may involve cross-examination on character traits which relate to truth and veracity (gave false information to a law enforcement officer; falsified expense account records).

3. This instruction should be given if requested by the party who has offered the character witness at the time the evidence is introduced.

Instructions for Use During Trial

2.08A EVIDENCE ADMITTED AGAINST ONLY ONE PARTY

Each party is entitled to have the case decided solely on the evidence which applies to that party. Some of the evidence in this case is limited under the rules of evidence to one of the parties, and cannot be considered against the others.

The evidence you [are about to hear] [just heard][1] can be considered only in the case against _____.[2]

Committee Comments

This type of instruction may be used when evidence limited to one or more parties is admitted. *Cf. United States v. Kelly*, 349 F.2d 720, 757 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *but see United States v. Polizzi*, 500 F.2d 856, 903 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975) (not error to refuse a defendant's requested instruction that no evidence introduced by codefendants could be used against him where he rested at close of plaintiff's case).

See 8th Cir. Crim. Jury Instr. 2.14 (2000); 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.41 (5th ed. 2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 19 (1988); *9th Cir. Crim. Jury Instr.* 1.14 (2000). *See generally* West Key # "Criminal Law" 673(4), "Trial" 54(2). Fed. R. Evid. 105 requires such an instruction if requested when evidence is admitted against less than all parties.

Notes on Use

1. If desired, the trial judge may give a brief summary of the evidence which is admitted against only one of the parties.

2. State name of party or parties.

Instructions for Use During Trial

2.08B EVIDENCE ADMITTED FOR LIMITED PURPOSE

The evidence [(you are about to hear) (you have just heard)] may be considered by you only on the [(issue) (question)] _____. It may not be considered for any other purpose.

Committee Comments

Such an instruction is appropriate at the time evidence admitted for a limited purpose is received; for example, when a prior inconsistent statement is admitted, or evidence is admitted or prior similar incidents to prove notice by defendant of a defect.

With respect to the use of prior inconsistent statements, Fed. R. Evid. 105 gives a party the right to require a limiting instruction explaining that the use of this evidence is limited to credibility. This instruction is appropriate for that purpose. Note, however, that the limiting instruction should not be given if the prior inconsistent statement was given under oath in a prior trial, hearing or deposition, because such prior sworn testimony of a witness is not hearsay and may be used to prove the truth of the matters asserted. Fed. R. Evid. 801(d)(1)(A).

See infra Model Instruction 3.03 for additional comments on credibility.

Instructions for Use During Trial

2.09 IMPEACHMENT OF WITNESS, PRIOR CONVICTION

You have heard evidence that witness[1] _____ has been convicted of [a crime] [crimes]. You may use that evidence only to help you decide whether to believe the witness and how much weight to give his [her] testimony.

Committee Comments

The admissibility of prior convictions to impeach a witness' credibility is governed by Fed. R. Evid. 609. In civil cases tried before December 1, 1990, the trial judge had no discretion to balance the probative value against the prejudicial effect. The conviction had to be admitted if it came within the rule. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989); *Jones v. Board of Police Comm'rs*, 844 F.2d 500, 504-05 (8th Cir. 1988). Effective December 1, 1990, Rule 609 reinstates the balancing feature. If the conviction involves dishonesty or false statements, it may be admitted even if not a felony. Fed. R. Evid. 609. There is substantial dispute about how much information may be injected concerning the prior conviction. Some judges do not even allow evidence of what crime, or what punishment was involved. The judge may allow evidence of the specific crime committed and the sentence. *Ross v. Jones*, 888 F.2d 548, 555 (8th Cir. 1989). Fed. R. Evid. 105 gives a party the right to require a limiting instruction explaining that the use of this evidence is limited to credibility.

See 8th Cir. Crim. Jury Instr. 2.18 (2000); 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.44 (5th ed. 2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 30 (1988); *Fifth Circuit Pattern Jury Instructions - Civil*, Instruction 2.17 (West 1998); *9th Cir. Crim. Jury Instr.* 4.8 (2000). *See generally* Fed. R. Evid. 609, 105; West Key # "Witnesses" 344(1-5), 345 (1-4).

Notes on Use

1. If the party in a civil case has a conviction which is introduced in evidence, it would be appropriate to modify Eighth Cir. Crim. Inst. 2.16 and give the following instruction, unless the evidence is admitted under Fed. R. Evid. 404(b) to prove motive, intent, plan, etc. Crim. Inst. 2.16, modified for civil cases is as follows:

> You [are about to hear] [have heard] evidence that (name) was previously convicted of [a] crime[s]. You may use that evidence only to help you decide whether to believe [his] [her] testimony and how much weight to give it. That evidence does not mean that [he] [she] engaged in the conduct alleged here, and you must not use that evidence as any proof [he] [she] engaged in that conduct.

If the evidence is admitted under Fed. R. Evid. 404(b), Crim. Inst. 2.08 may be modified and used.

Instructions for Use During Trial

2.10 SUMMARIES OF RECORDS AS EVIDENCE
Commentary

The Committee recommends that no instruction be given because it is now clear that under Fed. R. Evid. 1006 the summary itself is evidence. *See United States v. Smyth*, 556 F.2d 1179, 1184 (5th Cir. 1977).

Instructions for Use During Trial

2.11 WITHDRAWAL

The claim of plaintiff[s] that the defendant[s] _____[1] is no longer before you and will not be decided by you.

Committee Comments

This is a simplified form. An identical instruction, Model Instruction 3.05, *infra*, has been included in section 3 for advising the jury of the withdrawal of a claim at the end of the trial. This instruction is intended for use during the time at which the claim is withdrawn and may be modified and used for the withdrawal of counterclaims or affirmative defenses. If this instruction is given during the course of trial, it need not be given with the final instructions. The judge may wish to discuss the matter of withdrawal of a claim with the lawyers to obtain an agreement as to what the jurors are told.

See 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.60 (5th ed. 2000).

Notes on Use

1. Describe briefly the claim which is being withdrawn. If a defendant is dismissed, modify the instruction as follows:

> The claim of plaintiff against defendant _____ is no longer before you and need not be decided by you.

(**Note:** If a counterclaim is dismissed, transpose the names of plaintiff and defendant.)

3. INSTRUCTIONS FOR USE AT CLOSE OF TRIAL
Introductory Comment

If issue/element instructions are submitted to the jury in writing, then these general instructions should also be submitted in writing at the same time. They are intended as general instructions to be submitted after all evidence has been presented. They may be given either before or after closing arguments, or may be given partially before and partially after arguments. Fed. R. Civ. P. 51.

The elements instructions included herein all have what might be called a converse tail; that is, a last sentence which tells the jury their verdict must be for defendant if any of the elements have not been proved. It would also be proper if the court or parties desire, to delete that sentence and have a separate instruction which tells the jury their verdict must be for defendant unless they find by a [(greater weight) or (preponderance)] of the evidence that any required element of plaintiff's case has not been proved. *See infra* Model Instruction 7.02A for the format to be used for such instruction. This approach has the advantage of letting a defendant "target" or "focus" the case on the element which is most contested. It also may aid the jury to know where their attention should be focused.

Instructions for Use at Close of Trial

3.01 EXPLANATORY

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. [This is true even though some of those I gave you [at the beginning of] [during] trial are not repeated here.]

[1][The instructions I am about to give you now [as well as those I gave you earlier] are in writing and will be available to you in the jury room.] [I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.]

Committee Comments

See 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 103.01 (5th ed. 2000); *9th Cir. Crim. Jury Instr.* 3.1 (2000). *See generally* West Key # "Criminal Law" 887.

Notes on Use

1. Optional for use when the final instructions are to be sent to the jury room with the jury. The Committee recommends that practice.

Instructions for Use at Close of Trial

3.02 JUDGE'S OPINION

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict[s] should be.

[During this trial I have occasionally asked questions of witnesses. Do not assume that because I asked questions I hold any opinion on the matters to which my questions related.][1]

Notes on Use

1. Use only if judge has asked questions during the course of the trial.

Instructions for Use at Close of Trial

3.03 CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time,[1] the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

[In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.]

Committee Comments

The form of credibility instruction given is within the discretion of the trial court. *Clark v. United States*, 391 F.2d 57, 60 (8th Cir.), *cert. denied*, 393 U.S. 873 (1968); *United States v. Merrival*, 600 F.2d 717, 719 (8th Cir. 1979). In *Clark* the court held that the following instruction given by the trial court correctly set out the factors to be considered by the jury in determining the credibility of the witnesses:

> You are instructed that you are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining such credibility and weight you will take into consideration the character of the witness, his or her demeanor on the stand, his or her interest, if any, in the result of the trial, his or her relation to or feeling toward the parties to the trial, the probability or improbability of his or her statements as well as all the other facts and circumstances given in evidence.

391 F.2d at 60. In *Merrival*, the court held that the following general credibility instruction provided protection for the accused:

> You, as jurors, are the sole judges of the truthfulness of the witnesses and the weight their testimony deserves.

Instructions for Use at Close of Trial

> You should carefully study all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's ability to observe the matters as to which he or she has testified and whether each witness is either supported or contradicted by other evidence in the case.

600 F.2d at 720 n.2.

The general credibility instruction given in *United States v. Phillips*, 522 F.2d 388, 391 (8th Cir. 1975) covers other details:

> The jurors are the sole judges of the weight and credibility of the testimony and of the value to be given to each and any witness who has testified in the case. In reaching a conclusion as to what weight and value you ought to give to the testimony of any witness who has testified in the case, you are warranted in taking into consideration the interest of the witness in the result of the trial; take into consideration his or her relation to any party in interest; his or her demeanor upon the witness stand; his or her manner of testifying; his or her tendency to speak truthfully or falsely, as you may believe, the probability or improbability of the testimony given; his or her situation to see and observe; and his or her apparent capacity and willingness to truthfully and accurately tell you what he or she saw and observed; and if you believe any witness testified falsely as to any material issue in this case, then you must reject that which you believe to be false, and you may reject the whole or any part of the testimony of such witness. (Emphasis omitted.)

The instruction in the text is basically a paraphrase of *9th Cir. Crim. Jury Instr.* 3.9 (2000) and 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 101.43 (5th ed. 2000), as approved in *United States v. Hastings*, 577 F.2d 38, 42 (8th Cir. 1978). However, any factors set out in the *Phillips*, *Clark*, or *Merrival* instructions may be added in as deemed relevant to the case.

A general instruction on the credibility of witnesses is in most cases sufficient. Whether a more specific credibility instruction is required with respect to any particular witness or class of witnesses is generally within the discretion of the trial court.

The credibility of a child witness is covered in 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 105.12 (5th ed. 2000). Ninth Circuit Instruction 4.15 recommends that no "child witness" instruction be given. This Committee joins in those comments.

The testimony of police officers is addressed in *Golliher v. United States*, 362 F.2d 594, 604 (8th Cir. 1966).

Instructions for Use at Close of Trial

Factors to be taken into account in determining whether a special instruction is warranted with respect to a drug user are discussed in *United States v. Johnson*, 848 F.2d 904, 905-06 (8th Cir. 1988).

Whether a party is entitled to a more specific instruction on witness bias is also generally left to the discretion of the trial court. *See United States v. Ashford*, 530 F.2d 792, 799 (8th Cir. 1976).

See 9th Cir. Crim. Jury Instr. 3.9 (2000); 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 105.01 (5th ed. 2000); *Fifth Circuit Pattern Jury Instructions - Civil*, Instruction 3.1 (West 1998); U.S. *Eleventh Circuit Pattern Jury Instructions - Civil Cases*, Instruction 3 (West 1990); *United States v. Hastings*, 577 F.2d 38, 42 (8th Cir. 1978). *See generally* West Key # "Criminal Law" 785(1-16).

See also Model Instruction l.05, *infra*.

Notes on Use

1. With respect to the use of prior inconsistent statements (second paragraph of this instruction), Fed. R. Evid. 105 gives a party the right to require a limiting instruction explaining that the use of this evidence is limited to credibility. Note, however, that such a limiting instruction should not be given if the prior inconsistent statement was given under oath in a prior trial, hearing or deposition, because such prior sworn testimony of a witness is not hearsay and may be used to prove the truth of the matters asserted. Fed. R. Evid. 801(d)(1)(A).

Instructions for Use at Close of Trial

3.04 BURDEN OF PROOF

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim [or defense][1] depends upon that fact. The party who has the burden of proving a fact must prove it by the [(greater weight) or (preponderance)][2] of the evidence. To prove something by the [(greater weight) or (preponderance)] of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. [If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.]

[The [(greater weight) or (preponderance)] of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.]

[You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.]

Committee Comments

The phrases which are bracketed are optional, depending upon the preference of the judge. If a different burden-of-proof instruction is used, the issue/element instructions should be modified to correspond to the language of that burden-of-proof instruction. Again, the Committee recognizes that judges may desire to use the burden-of-proof formulation found in the pattern jury instructions adopted by their particular states. If such a burden-of-proof instruction is used, the issue/element instruction must be modified accordingly. The elements instructions will direct the jury to find in favor of a party if "it has been proved," without reference to who must prove the elements. That is not an oversight because it does not matter which party proves something, *e.g.*, whether defendant proved part of plaintiff's case. It only matters, at that stage in the proceedings, whether it has been proved by anyone.

Clear and convincing evidence is needed in very limited circumstances, for example, in a diversity case when the state standard is clear and convincing. Cases to set aside transfers as a fraud on creditors tried before a jury do not require such proof. They also use the general federal "preponderance of the evidence" standard of proof. *Grogan v. Garner*, 498 U.S. 279 (1991).

Instructions for Use at Close of Trial

Notes on Use

1. Include when an affirmative defense will be submitted to the jury.

2. Select the bracketed language which corresponds to the burden-of-proof instruction given.

Instructions for Use at Close of Trial

3.05 WITHDRAWAL (OF CLAIM)

The claim of plaintiff[s] that the defendant[s] _____[1] is no longer before you and will not be decided by you.

Committee Comments

This instruction is intended for use during the time at which the claim is withdrawn and may be modified and used for the withdrawal of counterclaims or affirmative defenses. If this instruction is given during the course of trial, it need not be given with the final instructions. The judge may wish to discuss the matter of withdrawal of a claim with the lawyers to obtain an agreement as to what the jurors are told.

See 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.60 (5th ed. 2000).

Notes on Use

1. Describe briefly the claim which is being withdrawn. If a defendant is dismissed, modify the instruction as follows:

> The claim of plaintiff against defendant _____ is no longer before you and will not be decided by you.

(**Note:** If a counterclaim is dismissed, transpose the names of plaintiff and defendant.)

Instructions for Use at Close of Trial

3.06 ELECTION OF FOREPERSON; DUTY TO DELIBERATE; COMMUNICATIONS WITH COURT; CAUTIONARY; UNANIMOUS VERDICT; VERDICT FORM

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.[1]

Finally, the verdict form is simply the written notice of the decision that you reach in this case. [The form reads: (read form)]. You will take this form to the jury room, and when each of you has agreed on the verdict[s], your foreperson will fill in the form, sign and date it, and advise the marshal or bailiff that you are ready to return to the courtroom.

[If more than one form was furnished, you will bring the unused forms in with you.]

Instructions for Use at Close of Trial

Committee Comments

If a hung jury is possible, use Model Instruction 3.07, *infra*.

Notes on Use

1. The trial judge may give a fair summary of the evidence as long as the comments do not relieve the jury of its duty to find that each party has proved those elements of the case upon which such party has the burden of proof. Judges may, in appropriate cases, focus the jury on the primary disputed issues, but caution should be exercised in doing so. *See United States v. Neumann*, 887 F.2d 880, 882-83 (8th Cir. 1989) (en banc).

Instructions for Use at Close of Trial

3.07 "ALLEN" CHARGE TO BE GIVEN AFTER EXTENDED DELIBERATION

As stated in my instructions, it is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself; but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion if you are convinced it is wrong. To reach a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to re-examine your own views.

Finally, remember that you are not partisans; you are judges - judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. But I suggest that you carefully [re]consider all the evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be disposed of at some later time.[1]

[Please go back now to finish your deliberations in a manner consistent with your good judgment as reasonable persons.][2]

Committee Comments

This instruction is a modification of *8th Cir. Crim. Jury Instr.* 10.02 (2000). *See also* the Committee Comments in that instruction. The language of this instruction covers the essential points of the traditional "Allen" charge, taken from the instruction approved in *United States v. Smith*, 635 F.2d 716, 722-23 (8th Cir. 1980). Judge Gibson noted in *Potter v. United States*, 691 F.2d 1275,

1277 (8th Cir. 1982) that "caution . . . dictates . . . that trial courts should avoid substantial departures from the formulations of the charge that have already received judicial approval."

It is not necessarily reversible error for the trial court to give a supplemental instruction *sua sponte* and even without direct announcement by the jury of its difficulty. *United States v. Smith*. The safe practice, however, would be to give such an instruction only after the jury has directly communicated its difficulty or the length of time spent in deliberations, compared with the nature of the issues and length of trial, and makes it clear that difficulty does exist. A premature supplemental charge certainly could, in an appropriate case, be sufficient cause for reversal.

The trial court may make reasonable inquiries to determine if a jury is truly deadlocked, but may not ask the jury of the nature and extent of its division. *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Brasfield v. United States*, 272 U.S. 448 (1926); *United States v. Webb*, 816 F.2d 1263, 1266 (8th Cir. 1987). The fact that the court inadvertently learns the division of the jurors does not, by itself, prevent the giving of a supplemental charge. *United States v. Cook*, 663 F.2d 808 (8th Cir. 1981); *Anderson v. United States*, 262 F.2d 764, 773-74 (8th Cir.), *cert. denied*, 360 U.S. 929 (1959). Such an instruction can be coercive, however, where the sole dissenting juror is aware that the court knows his identity. *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984).

In this circuit the defendant is not entitled to an instruction that the jury has the right to reach no decision. *United States v. Arpan*, 887 F.2d 873 (8th Cir. *en banc* 1989).

A court may give an Allen charge without consent of the lawyers. It has been widely approved by federal courts of appeal as a fair and reasonable way to urge jurors to reach a verdict. The Eighth Circuit, in criminal cases, has consistently upheld the authority of the court to give the Allen charge after extended jury deliberation *without* either requesting or receiving consent from the attorneys representing the parties. *See*, *e.g.*, *United States v. Singletary*, 562 F.2d 1058, 1060 (8th Cir. 1977); *United States v. Ringland*, 497 F.2d 1250, 1252-53 (8th Cir. 1974).

The Third Circuit has totally banned Allen charges, holding that such charges are overly coercive. *United States v. Fioravanti*, 412 F.2d 407 (3d Cir. 1969). The Tenth Circuit has cautioned that the Allen charge should be included, if at all, in the original instructions due to the "inherent danger in this type of instruction when given to an apparently deadlocked jury." *United States v. Wynn*, 415 F.2d 135, 137 (10th Cir. 1969).

While the Eighth Circuit has "encouraged district courts to consider with particular care whether a supplemental *Allen* instruction is absolutely necessary under the circumstances," *Potter v. United States*, 691 F.2d 1275, 1277 (8th Cir. 1982) (citing *United States v. Smith*, 635 F.2d at 722), the Eighth Circuit has refused to adopt the Third Circuit ban on Allen charges. *United States v. Skillman*, 442 F.2d 542, 558 (8th Cir. 1971).

Instructions for Use at Close of Trial

Although Allen charges have primarily been considered in criminal cases, courts in civil cases also have authority to give Allen charges. *See Railway Express Agency v. Mackay*, 181 F.2d 257, 262-63 (8th Cir. 1950); *Hill v. Wabash Ry. Co.*, 1 F.2d 626, 631 (8th Cir. 1924). *See also* 3 Sand, Siffert, Reiss, Sexton and Thrope, *Modern Federal Jury Instructions*, Instruction 78-4 Comment, p. 78-12 to 78-13 (1990). Therefore, courts in both criminal and civil cases have the authority to give Allen charges without the consent of attorneys for the parties.

Notes on Use

1. A more expanded version of this instruction has been approved by this Circuit. *See United States v. Smith*, 635 F.2d at 722-23; *United States v. Singletary*, 562 F.2d at 1060-61; *United States v. Hecht*, 705 F.2d 976, 979 (8th Cir. 1983).

2. Use this sentence when this charge is being given after deliberations have begun.

4. CIVIL RIGHTS - ELEMENT AND DAMAGE INSTRUCTIONS
Introductory Comment

Section 4 contains jury instructions relating primarily to prisoner civil rights cases. This section is organized as follows:

4.10 - 4.19	Instructions covering cases filed by individuals who are complaining of the manner in which they were treated at the time they were arrested and before they were placed in confinement (governed generally by the Fourth Amendment);
4.20 - 4.29	Instructions covering complaints filed by individuals after they are placed in confinement but before they are convicted (pretrial detainees) (governed generally by the Fifth and Fourteenth Amendments due process clauses which require that force be reasonably related to legitimate institutional needs; and
4.30 - 4.39	Instructions covering complaints filed by individuals after they are sentenced (governed generally by the Eighth Amendment).
4.40 - 4.49	Definitions
4.50 - 4.59	Damages
4.60 - 4.69	Verdict Forms

4.10 EXCESSIVE USE OF FORCE - ARREST OR OTHER SEIZURE OF PERSON - BEFORE CONFINEMENT - FOURTH AMENDMENT

Your verdict must be for plaintiff [and against defendant _____][1] [here generally describe the claim][2] if all the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, defendant [here describe an act such as "struck, hit, or kicked"][4] plaintiff in the act of [arresting or stopping][5] plaintiff, and

Second, the use of such force was excessive because it was not reasonably necessary to [here describe the purpose for which force was used such as "arrest plaintiff," or "take plaintiff into custody," or "stop plaintiff for investigation"], and

Third, as a direct result, plaintiff was damaged,[6] and

[*Fourth*, defendant was acting under color of state law.][7]

In determining whether such force, [if any][8] was "not reasonably necessary," you must consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether a reasonable officer on the scene, without the benefit of 20/20 hindsight, would have used such force under similar circumstances. [The jury must consider that police officers are often forced to make judgments about the amount of force that is necessary in circumstances that are tense, uncertain and rapidly evolving.][9] [The jury must consider whether the officer's actions are reasonable in the light of the facts and circumstances confronting the officer, without regard to the officer's own state of mind, intention or motivation.][10]

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, then your verdict must be for defendant.

Committee Comments

This instruction should only be used in connection with claims by *unconvicted* persons that excessive force was used to arrest them, stop them for investigation, or otherwise seize them. In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court rejected substantive due process standards which had long been applied in cases involving claims by *unconvicted persons* of excessive force by public officers. Rather, the Court held that a "reasonableness" standard, derived

from the Fourth Amendment, applied in cases involving the use of force in making an arrest or an investigatory stop. *Id.* at 393-94. *See also Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). Thus, in cases involving claimed excessive use of force in the seizure of unconvicted persons, the trial judge cannot rely upon the pre-*Graham* body of law which applied substantive due process standards under *Bauer v. Norris*, 713 F.2d 408 (8th Cir. 1983).

Jackson v. Crews, 873 F.2d 1105 (8th Cir. 1989) specifically recognized that the "shock the conscience" standard is not appropriate in arrest cases. The case reaffirmed that the four factors set forth in *Davis v. Forrest*, 768 F.2d 257 (8th Cir. 1985) are sufficient in the jury instruction, and that it would not be appropriate to require an additional finding that the defendant's conduct "shocks the conscience" before a constitutional violation is found.

Once an unconvicted person becomes a pretrial detainee, the use of force is measured by a substantive due process standard of the Fifth and Fourteenth Amendments. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989). *See generally*, Model Instruction 4.20, *infra*, for use of excessive force claims of pretrial detainees. The Eighth Circuit has not decided when the person's status changes from "arrestee" to "pretrial detainee." Most circuits that have addressed the issue found that the person becomes a pretrial detainee after the time of the first appearance before a judicial officer. *See Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989); *Hammer v. Gross*, 884 F.2d 1200, 1204 (9th Cir. 1989), *vacated en banc on other grounds*, 932 F.2d 842, 845 n.1 (9th Cir. 1991) (noting agreement with Fourth Amendment standard), *cert. denied*, 502 U.S. 980 (1991); *Austin v. Hamilton*, 945 F.2d 1155, 1159-60, 1162 (10th Cir. 1991), *abrogated on other grounds by Johnson v. Jones*, 515 U.S. 304 (1995); *Pride v. Does*, 997 F.2d 712, 716 (10th Cir. 1993). These cases are discussed and collected in *Pyka v. Village of Orland Park*, 906 F. Supp. 1196, 1220 (N.D. Ill. 1995). The prevailing view appears to be that the use of force by the arresting officer, after the individual is taken into custody, but prior to the first appearance before a neutral judicial officer, is to be decided under Fourth Amendment standards. The individual's status as a pretrial detainee continues until the individual has been sentenced. *Williams-El v. Johnson*, 872 F.2d 224, 228-29 (8th Cir. 1989) (a person convicted, not yet sentenced, is still a pretrial detainee).

Any injury can be sufficient to warrant an award of damages. *See Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988); *Bolin v. Black*, 875 F.2d 1343, 1350 (8th Cir.), *cert. denied*, 493 U.S. 993 (1989). The jury should be instructed on nominal damages when appropriate. *See infra* Model Instruction 4.52.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Describe the claim if plaintiff has more than one claim against this defendant.

[3] Select the bracketed language which corresponds to the burden-of-proof instruction given.

[4] The conduct indicated by plaintiff's evidence should be described generally.

[5] Here describe the nature of the seizure of plaintiff in which defendant was engaged. For the standards for determining whether a seizure under the Fourth Amendment was made or claimed, *see California v. Hodari D.*, 499 U.S. 621 (1991); *Cole v. Bone*, 993 F.2d 1328, 1332-33 (8th Cir. 1993).

[6] A finding that plaintiff suffered some actual injury or damage is necessary before an award of substantial compensatory damages may be made under 42 U.S.C. § 1983. *Cunningham v. City of Overland*, 804 F.2d 1066, 1069-70 (8th Cir. 1986). Specific language which describes the damage plaintiff suffered may be included here and in the damage instruction. Model Instruction 4.51, *infra*.

A nominal damages instruction may have to be submitted under *Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988). *See infra* Model Instruction 4.52.

[7] Use this paragraph only if there is an issue as to whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction. Color of state law will have to be defined on the factual issue specified if this paragraph is used. *See infra* Model Instruction 4.40.

[8] Include this phrase if defendant denies the use of any force.

[9] Add this phrase if appropriate. *See Graham v. Connor*, 490 U.S. 386 (1989).

[10] Add this phrase if justified by the evidence. *See Graham v. Connor*, 490 U.S. 386 (1989).

4.20 EXCESSIVE USE OF FORCE - PRETRIAL DETAINEES - FIFTH AND FOURTEENTH AMENDMENTS

Your verdict must be for plaintiff [and against defendant _____][1] [here generally describe the claim][2] if all the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, defendant [here describe an act such as "struck, hit, or kicked"][4] plaintiff, and

Second, the use of such force was excessive because it was not reasonably necessary to [here describe the purpose for which force was used such as "restore order," or "maintain discipline,"][5], and

Third, as a direct result, plaintiff was damaged,[6] and

[*Fourth*, defendant was acting under color of state law.][7]

In determining whether the force [if any][8] was excessive, you must consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether it was used for punishment or instead to achieve a legitimate purpose such as maintaining order or security within [here describe the facility in which plaintiff was incarcerated] and whether a reasonable officer on the scene would have used such force under similar circumstances.

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, then your verdict must be for defendant.

Committee Comments

At the time of arrest, a person's right to be free from excessive force is determined under the Fourth Amendment. *See infra* Committee Comments to Model Instruction 4.10. However, different constitutional protections may apply at different junctures of the custodial continuum running through initial arrest to post-conviction incarceration. *Valencia v. Wiggins*, 981 F.2d 1440, 1443-45 (5th Cir. 1993); *Austin v. Hamilton*, 945 F.2d 1155, 1158 (10th Cir. 1991); *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990). Precisely *when* the standards shift is the subject of debate. *See Austin v. Hamilton*, 945 F.2d at 1158-60 (discussion of the debate among the circuits). Once an unconvicted person becomes a pretrial detainee, the use of force is measured by a substantive due process standard under the Fifth and Fourteenth Amendments. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989). *See generally* Model Instruction 4.10, *infra*, for claims involving use of excessive force during arrest. The Eighth Circuit has not decided when the person's status

changes from "arrestee" to "pretrial detainee." Most circuits that have addressed the issue found that the person becomes a pretrial detainee after the time of the first appearance before a judicial officer. *See Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989); *Hammer v. Gross*, 884 F.2d 1200, 1204 (9th Cir. 1989), *vacated en banc on other grounds*, 932 F.2d 842, 845 n.1 (9th Cir. 1991) (noting agreement with Fourth Amendment standard), *cert. denied*, 502 U.S. 980 (1991); *Austin v. Hamilton*, 945 F.2d 1155, 1159-60, 1162 (10th Cir. 1991), *abrogated on other grounds by Johnson v. Jones*, 515 U.S. 304 (1995); *Pride v. Does*, 997 F.2d 712, 716 (10th Cir. 1993). These cases are discussed and collected in *Pyka v. Village of Orland Park*, 906 F. Supp. 1196, 1220 (N.D. Ill. 1995). The prevailing view appears to be that the use of force by the arresting officer, after the individual is taken into custody, but prior to the first appearance before a neutral judicial officer, is to be decided under Fourth Amendment standards. The individual's status as a pretrial detainee continues until the individual has been sentenced. *Williams-El v. Johnson*, 872 F.2d 224, 228-29 (8th Cir. 1989) (a person convicted--but not yet sentenced--is still a pretrial detainee). *See also Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989). *See*, *e.g.*, *Davis v. Hall*, 992 F.2d 151 (8th Cir. 1993) and *Ervin v. Busby*, 992 F. 2d 147 (8th Cir. 1993). It is not clear to what extent this standard is different from the Fourth Amendment reasonableness standard, or the Eighth Amendment standard. *See Davis v. Hall*, 992 F.2d 151 (8th Cir. 1993); *Ervin v. Busby*, 992 F.2d 147 (8th Cir. 1993).

In *Ferguson v. Cape Girardeau*, 88 F.3d 647, 650 (8th Cir. 1996), the court stated

> Conditions of pretrial confinement are impermissible if they constitute punishment as determined by the due process standards of the Fifth and Fourteenth Amendments. *See Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L.Ed.2d 447 (1979). "[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id.* at 539, 99 S. Ct. at 1874. In evaluating the conditions, the court must look to a number of factors, including the size of the detainee's living space, the length of the confinement, the amount of time spent in the confined area each day, and the opportunity for exercise. *See A.J. v. Kierst*, 56 F.3d 849, 854-55 (8th Cir. 1995) (citations omitted).

However, in *Whitnack v. Douglas County*, 16 F.3d 954 (8th Cir. 1994), the court applied the deliberate indifference standard in a conditions of confinement case involving both convicted individuals and pretrial detainees. In *Davis*, the court applied the deliberate indifference standard in a case involving medical care of a pretrial detainee. Thus, it appears the Eighth Circuit will use the deliberate indifference standard in some cases involving conditions of confinement and denial of adequate medical care and the reasonableness standard in other cases. However, because it is not permissible to punish pretrial detainees, the Eighth Amendment standard, which permits punishment that is not cruel or unusual, should not be used in excessive force cases. Thus, excessive force claims by pretrial detainees should be resolved by use of the reasonableness standard of the Fifth and Fourteenth Amendments due process clauses. This instruction uses the reasonableness standard.

Under the Due Process Clause, a pretrial detainee may not be punished prior to conviction. *Williams-El*, 872 F.2d at 228. Thus, the use of force must be necessary to some legitimate institutional interest such as safety, security or efficiency, and the force used may not be in excess of that reasonably believed necessary to achieve those goals. *Johnson-El*, 878 F.2d at 1048. It seems unlikely the court will apply Eighth Amendment standards for cases involving excessive force by guards; thus, this instruction should be used in such cases.

Any injury can be sufficient. *See Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988); *Bolin v. Black*, 875 F.2d 1343 (8th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989). The jury should be instructed on nominal damages, when appropriate. *See infra* Model Instruction 4.52.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Describe the claim if plaintiff has more than one claim against this defendant.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. The conduct indicated by plaintiff's evidence should be described generally.

5. *See City of Canton v. Harris*, 489 U.S. 378 (1989) for the standard for the pretrial detainee who is in custody. This instruction applies to persons who are not yet in custody at the time the excessive force is alleged to have occurred.

6. A finding that plaintiff suffered "damage, pain, misery, anguish or similar harm" is necessary for an Eighth Amendment violation. *See Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988). *But see Bolin v. Black*, 875 F.2d 1343 (8th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989) (sufficient to instruct that "unnecessary and wanton infliction of pain" was necessary without requiring a finding of injury). Specific language which describes the damage plaintiff suffered may be included here, and in the damage instruction, Model Instruction 4.51, *infra*. Nominal damages will also have to be submitted under *Cowans*. *See infra* Model Instruction 4.52.

7. Use this language if there is an issue as to whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction. Color of state law will have to be defined on the factual issue specified if this paragraph is used. *See infra* Model Instruction 4.40.

8. Include this phrase if defendant denies the use of any force.

4.30 EXCESSIVE USE OF FORCE - CONVICTED PRISONERS - EIGHTH AMENDMENT

Your verdict must be for plaintiff [and against defendant _____][1] [here generally describe the claim][2] if all the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, defendant [here describe an act such as "struck, hit, or kicked"][4] plaintiff, and

Second, the use of such force was excessive and applied maliciously and sadistically[5] for the very purpose of causing harm; [and not in a good faith effort to achieve a legitimate purpose;][6] and

Third, as a direct result, plaintiff was damaged,[7] and

[*Fourth*, defendant was acting under color of state law.][8]

In determining whether the force[, if any][9] was excessive, you must consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used[,] [and] the extent of the injury inflicted[, and whether the force was used to achieve a legitimate purpose or wantonly for the very purpose of causing harm]. "Maliciously" means intentionally injuring another without just cause or reason. "Sadistically" means engaging in extreme or excessive cruelty or delighting in cruelty.

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, then your verdict must be for defendant.

Committee Comments

This instruction should only be used when a *convicted* person claims his constitutional rights were violated because of the use of force by a state official or officer. If the plaintiff was a convicted prisoner at the time of the alleged violation, the appropriate standard derives from the Eighth Amendment. *Graham v. Connor*, 490 U.S. 386 (1989); *Whitley v. Albers*, 475 U.S. 312 (1986); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Black Spotted Horse v. Else*, 767 F.2d 516, 517 (8th Cir. 1985). The standards first articulated in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973) have been applied to excessive force cases involving both convicted and unconvicted persons. *Compare Black Spotted Horse v. Else* with *Bauer v. Norris*, 713 F.2d 408, 412-13 (8th Cir. 1983). However, in *Graham* the Supreme Court held that such standards, insofar as they direct an assessment of defendant's intent, are inappropriate in cases involving unconvicted persons. *Graham v. Connor*, 490 U.S. at 393-96. On the other hand, the standards of *Johnson* are appropriate for Eighth Amendment cases in that they require a balancing of factors, including

defendant's mental state. *See Hudson v. McMillian*,; *Burgin v. Iowa Dept. of Corr.*, 923 F.2d 637, 638 (8th Cir. 1991); *DeGidio v. Pung*, 920 F.2d 525, 532 (8th Cir. 1990) (malicious and sadistic standard); *Stenzel v. Ellis*, 916 F.2d 423, 427 (8th Cir. 1990). *See* note 5 for a discussion about whether the term "sadistic" should be included in the instruction.

The Committee recommends that a separate instruction presenting the affirmative defense of qualified immunity based upon defendant's "good faith" *should not* be given. A separate instruction is unnecessary because the issue/elements instruction itself requires the jury to assess defendant's intent in an Eighth Amendment context. *See Graham v. Connor*. Furthermore, the issue of good faith immunity is an issue the judge must decide, it is not a jury issue. *Coffman v. Trickey*, 884 F.2d 1057, 1062-63 (8th Cir. 1989). The elements instruction should set forth facts which, if found to be true, entitle plaintiff to a verdict.

Two phrases frequently come up in these cases. One is "maliciously and sadistically for the very purpose of causing harm," and the other is "wanton infliction of pain." The recent Eighth Circuit cases of *Howard v. Barnett*, 21 F.3d 868 (8th Cir. 1994) and *Cummings v. Malone*, 995 F.2d 817 (8th Cir. 1993) place substantial emphasis on the use of the words "malicious" and "sadistic" in the instructions themselves. The use of both phrases would be redundant. The Committee sees no benefit in telling the jury that the defendant must have acted both maliciously and sadistically for the very purpose of causing harm and for the purpose of wantonly inflicting pain. Thus, the "wanton infliction of pain" clause has been eliminated.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Describe the claim if plaintiff has more than one claim against this defendant.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. The conduct indicated by plaintiff's evidence should be described generally.

5. The issue of defendant's intent must be addressed as an element of the claim. *Howard v. Barnett*, 21 F.3d 868 (8th Cir. 1994); *Cummings v. Malone*, 995 F.2d 817 (8th Cir. 1993). If plaintiff claims force was used for an illegitimate purpose, for example, to deter his access to the courts, the trial judge should consider a modification of this phrase to reflect that improper purpose. If no force at all was appropriate, the term "excessive" could be replaced with "unnecessary." It has been suggested that the jury should not be directed to consider whether the force was applied maliciously if institutional security was not involved. *See Wyatt v. Delaney*, 818 F.2d 21, 23 (8th Cir. 1987). However, this element repeatedly has been associated with Eighth Amendment violations in excessive force cases. *See Graham v. Connor; Whitley v. Albers*. *See also Cowans v. Wyrick*. The cases frequently use the phrase "maliciously and sadistically." The Eighth Circuit has indicated that

the term "sadistically" is necessary to a correct statement of the law. *Howard v. Barnett*, 21 F.3d 868 (8th Cir. 1994). The term "sadistic," to some people, has sexual connotations. The Committee, therefore, recommends that both "maliciously" and "sadistically" be defined. *See infra* Model Instructions 4.45 and 4.46.

6. Use this phrase if the defendant acknowledges the use of force, but asserts that the force was used to achieve a legitimate purpose.

7. A finding that plaintiff suffered damage or "pain, misery, anguish or similar harm" may be necessary for an Eighth Amendment violation. *See Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988). *But see Bolin v. Black*, 875 F.2d 1343 (8th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989) (sufficient to instruct that "unnecessary and wanton infliction of pain" was necessary without requiring a finding of injury). Specific language which describes the damage plaintiff suffered may be included here, and in the damage instruction, Model Instruction 4.51, *infra*. Nominal damages will also have to be submitted under *Cowans*. *See infra* Model Instruction 4.52.

8. Use this language if there is an issue as to whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction. Color of state law will have to be defined on the factual issue specified if this paragraph is used. *See infra* Model Instruction 4.40.

9. Include this phrase if defendant denies the use of any force.

4.31 DENIAL OF MEDICAL CARE - CONVICTED PRISONERS* 42 U.S.C. § 1983

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's claim of deliberate indifference to his serious medical need][2] if all of the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, plaintiff had a serious need for [describe plaintiff's medical need, such as "treatment for a broken leg" or "pain medication"], and

Second, defendant was aware of plaintiff's serious need for such ["medical care" or "pain medication"], and

Third, defendant,[4] with deliberate indifference,[5] failed to ["provide the medical care" or "direct that the medical care be provided" or "allow plaintiff to obtain the medical care needed"] [within a reasonable time],[6] and

Fourth, as a direct result, plaintiff was damaged,[7] and

[*Fifth*, defendant was acting under color of state law.][8]

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, then your verdict must be for defendant.

Committee Comments

* *See infra* Model Instruction 4.20 for a discussion of the standards to be applied when dealing with use of force on pretrial detainees. Medical claims of pretrial detainees, in the Eighth Circuit, will be governed by the Eighth Amendment standard as long as *Davis v. Hall*, 992 F.2d 151 (8th Cir. 1993) is the controlling case. The "deliberate indifference" standard used in this instruction is an Eighth Amendment standard which is designed for use involving convicted persons. *See Wilson v. Seiter*, 501 U.S. 294 (1991); *Farmer v. Brennan*, 511 U.S. 825 (1994).

This instruction is derived from *Estelle v. Gamble*, 429 U.S. 97 (1976), which applies the Eighth Amendment to the United States Constitution to medical claims and sets the standards. *Wilson* did not change the standard, although it made it even more clear that the deliberate indifference standard applies to all conditions of confinement cases of convicted persons and that negligence is not sufficient.

See Gobert and Cohen, *Rights of Prisoners* § 11.10.

The following definition of "serious medical need" should be considered:

> A "serious" medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. *Laaman v. Helgemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977).

This definition of "serious medical need" was approved in *Johnson v. Busby*, 953 F.2d 349 (8th Cir. 1991).

Deliberate indifference, as used in a medical case means:

> [Intentionally] [deliberately] ignoring plaintiff's [serious medical needs]. Deliberate indifference is established only if there is actual knowledge of a substantial risk that plaintiff has a serious medical problem and if the defendant consciously refuses to take steps to deal with the problem. Mere negligence or inadvertence does not constitute deliberate indifference.

See Campbell v. Greer, 831 F.2d 700, 702 (7th Cir. 1987). *Campbell* also included the word "recklessly" in the definition. Analysis of the court's language in *Wilson* and *Farmer* indicates the court is limiting Eighth Amendment claims to those in which plaintiff can show actual subjective intent rather than just recklessness in the tort sense. In *Wilson*, the court characterized as Eighth Amendment violations only acts which are "*deliberate* act[s] *intended* to chastise or deter" (emphasis added) or "punishment [which] has been deliberately administered for a penal or disciplinary *purpose*" (emphasis added). *Wilson*, 501 U.S. at 300. In *Farmer*, the court stated that recklessness in the criminal law context is what is contemplated and that requires actual knowledge of a substantial risk. *Farmer* at 837. The court, continuing to follow the deliberate indifference standard, clearly stated that negligence was not sufficient. Application of this standard to some issues involving pretrial detainees is required by the Eighth Circuit (see cases cited in Instruction 4.20).

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Use this language when plaintiff has more than one claim.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. This instruction assumes that defendant had the responsibility to provide care for plaintiff's serious medical needs. If defendant has no duty, then a directed verdict would be appropriate. If the existence of the duty is disputed, the issue may be a question of law for the judge to decide. If a specific fact is disputed, which will be determinative of defendant's responsibility,

that fact should be submitted to the jury. For example, it may be disputed whether a certain person was working on a certain day. That question should be specifically submitted to the jury. The legal question whether a duty arises from a specific set of facts is a question for the judge.

5. It is probably best to define "deliberate indifference", although no Eighth Circuit law requires it. *See Howard v. Adkison*, 887 F.2d 134 (8th Cir. 1989); *Duckworth v. Franzen*, 780 F.2d 645, 654 (7th Cir. 1985).

6. Add this phrase if it is alleged the medical care was provided but not at a reasonable time.

7. *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) suggests that actual damages are required in Eighth Amendment cases. *But see Carey v. Piphus*, 435 U.S. 247 (1978) and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986), which stated that actual damages are not required in procedural due process cases. The Committee recommends requiring the jury to find that plaintiff sustained damage in all Eighth Amendment cases. The measure of damages is addressed in Model Instructions 4.51 and 4.52, *infra*. Nominal damages should be submitted in all Eighth Amendment cases, but must be defined in accordance with *Cowans* and Model Instruction 4.52, *infra*. *See also* Committee Comments, Model Instruction 4.51, *infra*.

8. Use this language if the issue of whether the defendant was acting under color of state law is still in the case. Color of state law will have to be defined. *See* 42 U.S.C. § 1983 and Model Instruction 4.40, *infra*.

4.32 FAILURE TO PROTECT FROM ATTACK - SPECIFIC ATTACK - CONVICTED PRISONERS - EIGHTH AMENDMENT

Your verdict must be for plaintiff [and against defendant _____][1] [here generally describe the claim][2] if all the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, [here describe the attacker(s) such as "one or more [inmates]"] [here describe an act such as "struck, hit or kicked"][4] plaintiff, and

Second, defendant was aware of the substantial risk of such attack; and

Third, defendant, with deliberate indifference to plaintiff's need to be protected from [such attack], failed to protect plaintiff; and

Fourth, as a direct result, plaintiff was damaged,[5] and

[*Sixth*, defendant was then acting under color of state law.][6]

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, then your verdict must be for defendant.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Describe the claim if plaintiff has more than one claim against this defendant.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. The conduct indicated by plaintiff's evidence should be described generally.

5. A finding that plaintiff suffered damage or "pain, misery, anguish or similar harm" may be necessary for an Eighth Amendment violation. *See Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988). *But see Bolin v. Black*, 875 F.2d 1343 (8th Cir. 1989), *cert. denied*, 493 U.S. 993 (1989) (sufficient to instruct that "unnecessary and wanton infliction of pain" was necessary without requiring a finding of injury). Specific language which describes the damage plaintiff suffered may be included here, and in the damage instruction, Model Instruction 4.51, *infra*. Nominal damages will also have to be submitted under *Cowans*. *See infra* Model Instruction 4.52.

6. Use this language if there is an issue as to whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be

conceded by the defendant. If so, it need not be included in this instruction. Color of state law will have to be defined on the factual issue specified if this paragraph is used. *See infra* Model Instruction 4.40.

4.40 DEFINITION: COLOR OF STATE LAW 42 U.S.C. § 1983

Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county or municipal law, ordinance or regulation.

Committee Comments

Adopted from *9th Cir. Civ. Jury Instr.* 11.1.1 (1997). *See Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299, *reh'g denied*, 314 U.S. 707 (1941). The court should, if possible, rule on the record whether the conduct of the defendant, if it occurred as claimed by the plaintiff, constitutes acts under color of state (county, municipal) law and not even instruct the jury on this issue. In most cases, the color of state law issue is not challenged and the jury need not be instructed on it. If it must be instructed, this instruction should normally be sufficient.

4.42 DEFINITION: PERVASIVE RISK OF HARM - CONVICTED PRISONERS 42 U.S.C. § 1983

Prisons, by their very nature, are sometimes dangerous, violent and unpredictable.[1] Thus, proof of a single or an isolated incident of (violence) (sexual assault) is [ordinarily][2] not sufficient to prove a pervasive risk of harm. On the other hand, it is not necessary to prove that a reign of violence or terror exists in the institution. A pervasive risk of harm exists when (violent acts) (sexual assaults) occur with sufficient frequency that a prisoner or prisoners are put in reasonable fear for their safety and prison officials are aware of the problem and the need for protective measures.[3]

Notes on Use

1. *Falls v. Nesbitt*, 966 F.2d 375 (8th Cir. 1992).

2. The Committee believes the word "ordinarily" should not be included unless the case is one in which the jury could appropriately find a pervasive risk of harm from an isolated or single incident. Most cases do not fit that pattern, and including the term "ordinarily" will likely create the impression that it is permissible to find a pervasive risk of harm based on a single incident in the case presented to the jury.

3. *Id.* at 378.

4.43 DEFINITION: SERIOUS MEDICAL NEED - CONVICTED PRISONERS 42 U.S.C. § 1983

A serious medical need is one that has been diagnosed by a physician as requiring treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.[1]

Committee Comments

This definition of "serious medical need" was approved in *Johnson v. Busby*, 953 F.2d 349 (8th Cir. 1991).

Notes on Use

1. *Laaman v. Helgemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977).

4.44 DEFINITION: DELIBERATE INDIFFERENCE - CONVICTED PRISONERS 42 U.S.C. § 1983

Deliberate indifference is established only if there is actual knowledge of a substantial risk that plaintiff (describe serious medical problem or other serious harm that defendant is expected to prevent) and if the defendant disregards that risk by intentionally refusing or failing to take reasonable measures to deal with the problem. Mere negligence or inadvertence does not constitute deliberate indifference.

Committee Comments

See Farmer v. Brennan, 511 U.S. 825 (1994) (clearly limiting deliberate indifference to intentional, knowing or recklessness in the criminal law context which requires actual knowledge of a serious risk). *Wilson v. Seiter*, 501 U.S. 294 (1991). The court is limiting Eighth Amendment claims to those in which plaintiff can show actual subjective intent rather than just recklessness in the tort sense. In *Wilson*, the court characterized as Eighth Amendment violations only acts which are "*deliberate* act[s] *intended* to chastise or deter" (emphasis added) or "punishment [which] has been deliberately administered for a penal or disciplinary *purpose*" (emphasis added). *Wilson*, 501 U.S. at 300. The court, continuing to follow the deliberate indifference standard, clearly stated that negligence was not sufficient.

The Committee believes the phrase "deliberate indifference" should probably be defined in most cases, although Eighth Circuit case law does not require it.

4.45 DEFINITION: MALICIOUSLY

"Maliciously" means intentionally injuring another without just cause or reason.

Committee Comments

See Howard v. Barnett, 21 F.3d 868 (8th Cir. 1994).

4.46 DEFINITION: SADISTICALLY

"Sadistically" means engaging in "extreme or excessive cruelty or delighting in cruelty."

Committee Comments

See Howard v. Barnett, 21 F.3d 868 (8th Cir. 1994).

4.51 ACTUAL DAMAGES - PRISONER CIVIL RIGHTS

If you find in favor of plaintiff, then you must award plaintiff such sum as you find from the [(greater weight) or (preponderance)] of the evidence will fairly and justly compensate plaintiff for [any damages][1] you find plaintiff sustained [and is reasonably certain to sustain in the future][2] as a direct result of [insert appropriate language such as "the conduct of defendant as submitted in Instruction _____" or "the failure to provide plaintiff with medical care" or "the violation of plaintiff's constitutional rights."][3] [You should consider the following elements of damages:

1. The physical pain and (mental) (emotional) suffering the plaintiff has experienced (and is reasonably certain to experience in the future); the nature and extent of the injury, whether the injury is temporary or permanent (and whether any resulting disability is partial or total) (and any aggravation of a pre-existing condition);

2. The reasonable value of the medical (hospital, nursing, and similar) care and supplies reasonably needed by and actually provided to the plaintiff (and reasonably certain to be needed and provided in the future);

3. The (wages, salary, profits, reasonable value of the working time) the plaintiff has lost [and the reasonable value of the earning capacity the plaintiff is reasonably certain to lose in the future] because of (his, her) (inability, diminished ability) to work.

[Remember, throughout your deliberations you must not engage in any speculations, guess, or conjecture and you must not award any damages under this Instruction by way of punishment or through sympathy.]

Committee Comments

The damages which may be recovered under 42 U.S.C. § 1983, are of three types: actual or compensatory, nominal and punitive. *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986). The actual or compensatory damages are to "compensate persons for injuries that are caused by the deprivation of constitutional rights," and not "undefinable value of infringed right" or "presumed" damages. *Id.* at 307 and 309. *See also Carey v. Piphus*, 435 U.S. 247 (1978). Actual damages include compensation for out-of-pocket loss, other monetary losses and for impairment of reputation, personal humiliation, mental anguish and suffering. *Memphis Community School Dist. v. Stachura*.

Cowans v. Wyrick, 862 F.2d 697 (8th Cir. 1988) suggests that actual damages are required in Eighth Amendment cases. *But see Carey v. Piphus*, 435 U.S. 247 (1978) and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986), which stated that actual damages are not required in procedural due process cases. The Committee recommends requiring the jury to find that plaintiff sustained damage in all Eighth Amendment cases. The measure of damages is also addressed in Model Instruction 4.52, *infra*. Nominal damages should be submitted in all Eighth Amendment cases, but must be defined in accordance with *Cowans* and Model Instruction 4.52, *infra*.

Notes on Use

1. A summary of the specific types of damage or injuries which are supported by the evidence can be described here in lieu of the phrase "any damages."

2. Use this language if permanent injuries are involved.

3. It is important to use language that limits the damages recovered to those which are attributable to the improper conduct of the defendant. *See Memphis Community Dist. v. Stachura*, 477 U.S. 299, 309-10 (1986).

4.52 NOMINAL DAMAGES - PRISONER CIVIL RIGHTS

If you find in favor of plaintiff under Instruction _____,[1] but you find that plaintiff's damages have no monetary value,[2] then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).[3]

Committee Comments

This instruction is derived from 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 128.82 (5th ed. 2000). It has been modified slightly.

In certain cases, nominal damages may be recovered when there is a violation of constitutional rights. *See Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978); *Tatum v. Houser*, 642 F.2d 253 (8th Cir. 1981); *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988). *Carey* discusses the amount of nominal damages at page 267.

The Committee recommends requiring the jury to find that plaintiff suffered damage in most cases, unless it is clear that recovery is permitted without a showing of any damage or injury. *See Memphis* and *Carey*. In classic Eighth Amendment cases, damages must be established and the elements instruction should require the jury to find that plaintiff sustained damage. However, nominal damages must still be submitted in Eighth Amendment cases if requested. The definition contained in this instruction is the one that should be used.

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988), a prisoner civil rights case, used the language "unable to place a monetary value" on plaintiff's damages as the proper standard for when nominal damages are appropriate. That language may mislead a jury to believe that nominal damages should be awarded if they are having a difficult time agreeing upon or deciding the amount which should be awarded to compensate for such elements of damage as suffering, humiliation, pain, etc.

3. One Dollar ($1.00) is arguably the required amount in cases in which nominal damages are appropriate. Nominal damages may be appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984). *See* Committee Comments.

4.53 PUNITIVE DAMAGES - CIVIL RIGHTS

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award the injured person punitive damages in order to punish the defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

If you find in favor of plaintiff and against defendant [name] [and if you find the conduct of that defendant as submitted in Instruction _____[1] was recklessly and callously indifferent to plaintiff's (specify, *e.g.*, medical needs),][2] then, in addition to any other damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or deter the defendant and others from like conduct in the future. Whether to award plaintiff punitive damages and the amount of those damages are within your sound discretion.[3]

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.][4]

Committee Comments

In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the Supreme Court held that a punitive damage award is constitutional if the jury instructions have "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." 499 U.S. at 19. The Committee believes that this punitive damage instruction meets the requirements of *Haslip*.

Notes on Use

1. Use if more than one element instruction.

2. Punitive damages are allowed even though the threshold for liability requires reckless conduct. If the threshold for the underlying tort liability is less than "reckless," the bracketed language correctly states the standard for punitive damages under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30 (1983). Other optional phrases may be used which embellish or describe the standard for punitive damages, but "reckless" and "callous indifference" state the legal threshold. If the threshold for liability is "reckless conduct" or something more culpable, no additional finding should

be necessary because the language in the issue/element instruction requires the jury to find the culpability necessary for imposing punitive damages. However, it is recommended that the punitive damage instruction include such language to be sure the jury focuses on that issue.

3. Factors which may, in appropriate circumstances, be considered by the jury in awarding punitive damages include, but are not limited to:

1. the nature of defendant's conduct;

2. the impact of defendant's conduct on the plaintiff;

3. the relationship between the plaintiff and defendant;

4. the likelihood that the defendant would repeat the conduct if a punitive award is not made;

5. the defendant's financial condition; and

6. any other circumstances shown by the evidence, including any circumstances of mitigation, that bear on the question of the size of any punitive award.

American College of Trial Lawyers, Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice (Mar. 3, 1989). *See generally Haslip*, 499 U.S. at 19, discussing factors used in Alabama to review appropriateness of punitive damage awards.

4. Use this language if there are multiple defendants. It will have to be modified if plaintiff has numerous elements instructions or if there are multiple plaintiffs.

Civil Rights - Element and Damage Instructions

4.54 et seq. (Reserved for Future Use)

4.60 VERDICT FORM - ONE PLAINTIFF, TWO DEFENDANTS, ONE INJURY CASE

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On plaintiff (name)'s claim against defendant (name), as submitted in Instruction No. _____, we find in favor of

_____

(Plaintiff (name)) or (Defendant (name))

On plaintiff (name)'s claim against defendant (name), as submitted in Instruction No. _____, we find in favor of

_____

(Plaintiff (name)) or (Defendant (name))

Note: Complete the following paragraphs only if one or more of the above findings is in favor of plaintiff.

We find plaintiff (name)'s damages to be:

$_____ (stating the amount or, if none, write the word "none")[1] (stating the amount, or if you find that plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).[2]

Note: You may not award punitive damages against any defendant unless you have first found against that defendant and awarded plaintiff nominal or actual damages.

We assess punitive damages against defendant (name) as follows:

$_____ (stating the amount or, if none, write the word "none").

We assess punitive damages against defendant (name of other defendant) as follows:

$_____ (stating the amount or, if none, write the word "none").

_____

Foreperson

Dated: _____

Civil Rights - Element and Damage Instructions

Notes on Use

1. Use this phrase if the jury has not been instructed on nominal damages.

2. Include this paragraph if the jury is instructed on nominal damages.

5. EMPLOYMENT CASES - ELEMENT AND DAMAGE INSTRUCTIONS
Overview

Section 5 contains model elements and damages instructions in employment discrimination cases. Currently, this section only addresses "disparate treatment" cases under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e to 2000e-17 (1994) ("Title VII"); the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (1994) ("ADEA"); 42 U.S.C. § 1981 (1994); and 42 U.S.C. § 1983 (1994).

Background of "Disparate Treatment" Instructions

When this project commenced in 1987, the Committee anticipated little difficulty in formulating appropriate model instructions. At that time, Title VII cases were not jury triable. *See Harmon v. May Broad. Co.*, 583 F.2d 410, 410 (8th Cir. 1978). Moreover, in ADEA cases, the standard for liability clearly appeared to be whether the plaintiff's age was a "determining factor" in the defendant's employment decision. *See Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

Over the next four years, however, the applicable law changed dramatically. For example, in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court ruled that 42 U.S.C. § 1981 could not be invoked to address claims of racially-motivated discharges or racial harassment. More significantly, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court ruled that different burdens of proof applied in Title VII cases, depending upon the type of evidence offered by the plaintiff: (1) In "pretext" cases, where the plaintiff relied upon "indirect evidence", the Court held that the employee had the burden of proving that unlawful discrimination was a "determining factor" in the challenged employment decision; and (2) in "mixed motive" cases, where the plaintiff relied upon "direct evidence" of discriminatory motivation, the Court ruled that, once the employee established that unlawful bias was a "motivating factor" in the challenged employment decision, the employer had the burden of showing that it would have made the "same decision" in the absence of any unlawful motivation.

Although *Price Waterhouse* was a Title VII case, the lower courts began applying this pretext/mixed motive distinction in jury cases. *Compare Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2d Cir. 1989) (instruction erroneously placed burden of proof on employee who relied upon "direct evidence" of statements manifesting bias) *with Lynch v. Belden & Co.*, 882 F.2d 262, 268-69 (7th Cir. 1989) (absent "direct evidence" of discrimination, burden of persuasion rested squarely with plaintiff). Accordingly, in the wake of *Price Waterhouse* and its progeny, the Committee developed alternative essential elements instructions for use in ADEA, § 1981, and § 1983 cases. First, in "indirect evidence" cases, the Committee prepared an instruction in which the plaintiff bore the burden of persuasion on the ultimate question of whether discrimination was a "determining factor" in the challenged employment decision. *See infra* Model Instruction 5.91. Second, in "direct evidence" cases, the Committee drafted an instruction that incorporated the burden-shifting approach announced in *Price Waterhouse*. *See infra* Model Instructions 5.11, 5.21, 5.31.

Employment Cases -- Element and Damage Instructions

Practical and Analytical Considerations

Despite its ability to draft separate instructions for "pretext" and "mixed motive" cases, the Committee observed that there would be significant difficulty in deciding how to classify a given case. For example, it was not entirely clear that a plaintiff was entitled to a "mixed motive" instruction merely by testifying as to "direct evidence" of discriminatory motivation. Moreover, the Committee noted that the trial court's choice between a "mixed motive" instruction and a "pretext" instruction would be extremely important because of the potentially dispositive difference in the burdens of persuasion contained in these instructions. Consequently, the Committee formulated a model set of special interrogatories to elicit jury findings under both burdens of proof. *See infra* Model Instruction 5.92.

While these special interrogatories elicited all of the necessary information to permit post-trial analysis under either a "mixed motive" or "pretext" standard, they admittedly were cumbersome and potentially confusing. The Committee also struggled with the logical basis for drawing a distinction between "pretext" and "mixed motive" cases which, in turn, appeared to depend upon the type of evidence offered by the plaintiff.[1] Indeed, in other contexts, the Committee has counseled against the use of instructions that distinguish between direct and circumstantial evidence. *See infra* Model Instruction 1.02.

The practical and logical problems created by the pretext/mixed motive distinction were exacerbated when Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (hereinafter "CRA of 91"). In this statute, Congress authorized jury trials in Title VII cases and, more importantly from an instructional standpoint, legislatively overruled *Price Waterhouse*

---

[1] By way of illustration, consider the following hypotheticals:

In Case No. 1, an age discrimination plaintiff relies exclusively upon "indirect evidence" that he was terminated for excessive absenteeism while several younger employees with a greater number of absences were not even disciplined by the employer.

In Case No. 2, the plaintiff relies on "direct evidence" by offering disputed testimony that his supervisor referred to his age while dismissing him for excessive absenteeism, while the undisputed evidence also shows that several younger employees with the same number of absences had been similarly dismissed.

Even though the claim in Case No. 2 seems considerably weaker than the claim in Case No. 1, the plaintiff would be entitled to an "easier" burden of proof in Case No. 2, under the pretext/mixed motive distinction. This peculiar result seemed to exemplify the practical and logical problems created by a distinction between direct and indirect evidence.

by expressly mandating a motivating factor/same decision analytical format. *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-z(m) (1994)). In turn, these legislative changes suggested that there could be further practical difficulties in cases where a race discrimination plaintiff joined a "pretext" claim under section 1981 and a claim under Title VII.

Alternative Approaches in "Disparate Treatment" Cases

Against this background, the Committee identified three choices for the "essential elements" instructions in ADEA, § 1981, and § 1983 cases. First, the Committee considered reverting to the use of a "determining factor" standard in all of these cases. Second, the Committee considered retention of separate essential elements instructions for pretext and mixed motive cases, along with the set of special interrogatories for "borderline" cases. Third, the Committee considered adoption of the motivating factor/same decision format in all cases.

Recommended Approach in "Disparate Treatment" Cases

Ultimately, the Committee decided to endorse the third option--the mixed motive/same decision format--as the preferred method of instructing on the issue of liability in "disparate treatment" cases filed under the ADEA, § 1981 and § 1983.[2] In the Committee's view, this approach has the virtues of uniformity, simplicity and consistency with Title VII cases to which the Civil Rights Act of 1991 applies.[3] In the event the trial court opts to use a "determining factor" instruction or the set of special interrogatories for "borderline" cases, the Committee has retained sample instructions. *See infra* Model Instructions 5.91 ("determining factor" instruction), 5.92 (special interrogatories). It bears emphasis that a proper set of instructions must be tailored for each individual case. *Cf. Brown v. Stites Concrete, Inc.*, 994 F.2d 553, 570 (8th Cir. 1993) (en banc) (Loken, J., dissenting from the panel opinion, which was partially reinstated and published as an appendix to the en banc opinion) (criticizing use of model employment instructions without tailoring them for particular case).

---

[2] Clearly, in Title VII cases, a motivating factor/same decision instructional format is appropriate. *See infra* Model Instructions 5.01, 5.01A.

[3] It bears emphasis that a "motivating factor" finding in a Title VII case establishes the defendant's liability in a Title VII case, while the defendant in an ADEA, § 1981, or § 1983 case may still prevail on the issue of liability if there is a favorable finding on the "same decision" issue.

5.00 DISPARATE TREATMENT CASES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE CIVIL RIGHTS ACT OF 1991
Introductory Comment

The following instructions are designed for use in jury trials under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. Under the Civil Rights Act of 1991, which was signed into law on November 22, 1991, plaintiffs may recover compensatory and punitive damages in "disparate treatment" cases under Title VII. In *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992), the Eighth Circuit held that section 101 of the 1991 amendments (overruling *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)), did not apply retroactively to cases pending at the time of their enactment. *See also Huey v. Sullivan*, 971 F.2d 1362 (8th Cir. 1992) (holding that section 114 of the 1991 Act authorizing interest on back pay, and section 113 allowing shifting of expert witness fees, are not retroactive).

Employment Cases -- Element and Damage Instructions

5.01 TITLE VII - DISPARATE TREATMENT - ESSENTIAL ELEMENTS

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's (sex)[2] discrimination claim][3] if all the following elements have been proved by the [(greater weight) (preponderance)][4] of the evidence:

First, defendant [discharged][5] plaintiff; and

Second, plaintiff's (sex) was a motivating factor[6] in defendant's decision.

If either of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, your verdict must be for defendant and you need not proceed further in considering this claim.

Committee Comments

This instruction is designed to submit the issue of liability in "disparate treatment" Title VII cases that are subject to the amendments set forth in the Civil Rights Act of 1991. Prior to these amendments, Title VII cases were not jury-triable, *Harmon v. May Broad. Co.*, 583 F.2d 410 (8th Cir. 1978), and the liability standards depended upon whether the case was classified as a "pretext" case or a "mixed motive" case. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Under the Civil Rights Act of 1991, these cases will be triable to a jury, *see* CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(c) (1994)), and, more importantly, the plaintiff prevails on the issue of liability if he or she shows that discrimination was a "motivating factor" in the challenged employment decision. *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-2(m) (1994)). Plaintiffs who prevail on the issue of liability will be eligible for a declaratory judgment and attorney fees; however, they cannot recover actual or punitive damages if the defendant shows that it would have made the same employment decision irrespective of any discriminatory motivation. *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (1994)); *see infra* Model Instruction 5.01A ("same decision" instruction).

It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). *See Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20-21 (8th Cir. 1985) (ADEA case). *See generally Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133, 135 (8th Cir. 1985) (after all of the evidence has been presented, inquiry should focus on ultimate issue of intentional discrimination, not on any particular step in the *McDonnell Douglas* paradigm). Accordingly, this instruction is focused on the ultimate issue of whether the plaintiff's protected characteristic was a "motivating factor" in the defendant's employment decision.

Employment Cases -- Element and Damage Instructions

Notes on Use

1. Use this phrase if there are multiple defendants.

2. This instruction is designed for use in a gender discrimination case. It must be modified if the plaintiff is claiming discrimination on the basis of race, religion, or some other prohibited factor.

3. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

4. Select the bracketed language that corresponds to the burden-of-proof instruction given.

5. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

6. The Committee believes that the phrase "motivating factor" should be defined. *See infra* Model Instruction 5.96.

5.01A TITLE VII - DISPARATE TREATMENT - "SAME DECISION" INSTRUCTION

If you find in favor of plaintiff under Instruction ____,[1] then you must answer the following question in the verdict form[s]: Has it been proved by the [(greater weight) (preponderance)][2] of the evidence that defendant [would have discharged][3] plaintiff regardless of [his/her] [sex]?[4]

Committee Comments

If a plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor," the defendant nevertheless may avoid an award of damages or reinstatement by showing that it would have taken the same action "in the absence of the impermissible motivating factor." *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (1994)). This instruction is designed to submit this "same decision" issue to the jury.

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote" or "demotion" case, the language within the brackets must be modified.

4. This instruction is designed for use in a gender discrimination case. The language within the brackets must be modified if other forms of discrimination are alleged. The practical effect of a decision in favor of plaintiff under Model Instruction 5.01, *infra*, but in favor of defendant on this question under Title VII, is a judgment for plaintiff and eligibility for an award of attorney fees but no actual damages. The Committee takes no position on whether the judge should advise the jury or allow the attorneys to argue to the jury the effect of a decision in favor of the defendant on the question set out in this instruction.

5.02 TITLE VII - DISPARATE TREATMENT - ACTUAL DAMAGES

If you find in favor of plaintiff under Instruction ____[1] and if you answer "no" in response to Instruction ____[2], then you must award plaintiff such sum as you find by the [(greater weight) (preponderance)][3] of the evidence will fairly and justly compensate plaintiff for any damages you find plaintiff sustained as a direct result of [describe defendant's decision - *e.g.*, "defendant's decision to discharge plaintiff"]. Plaintiff's claim for damages includes three distinct types of damages and you must consider them separately:

First, you must determine the amount of any wages and fringe benefits[4] plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge] through the date of your verdict,[5, 6, 7] *minus* the amount of earnings and benefits that plaintiff received from other employment during that time.

Second, you must determine the amount of any other damages sustained by plaintiff, such as [list damages supported by the evidence].[8] You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.

[You are also instructed that plaintiff has a duty under the law to "mitigate" his/her damages - that is, to exercise reasonable diligence under the circumstances to minimize his/her damages. Therefore, if you find by the [(greater weight) (preponderance)] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [him/her], you must reduce [his/her] damages by the amount [he/she] reasonably could have avoided if [he/she] had sought out or taken advantage of such an opportunity.][9]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][10]

Committee Comments

The Civil Rights Act of 1991 makes three significant changes in the law regarding the recovery of damages in Title VII cases. First, the plaintiff prevails on the issue of liability by showing that unlawful discrimination was a "motivating factor" in the relevant employment decision; however, the plaintiff cannot recover any actual damages if the employer shows that it would have

made the same employment decision even in the absence of any discriminatory intent. *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-2(g)(2)(B) (1994)). Second, the Civil Rights Act permits the plaintiff to recover general compensatory damages in addition to the traditional employment discrimination remedy of back pay and lost benefits. *See* CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(a) (1994)). Third, the Act expressly limits the recovery of general compensatory damages to certain dollar amounts, ranging from $50,000 to $300,000 depending upon the size of the employer. *See* CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(b) (1994)).

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982). This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus.*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits, and pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451-52 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible), *overruled on other grounds by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626-27 (6th Cir. 1983) (same). *But cf. Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same). However, because Title VII, as amended by the Civil Rights Act of 1991, no longer limits recovery of damages, the instruction permits the recovery of general damages for pain, suffering, humiliation, and the like.

Because the law imposes a limit on general compensatory damages but does not limit the recovery of back pay and lost benefits, the Committee believes that these types of damages must be considered and assessed separately by the jury. Otherwise, if the jury awarded a single dollar amount, it would be impossible to identify the portion of the award that was attributable to back pay and the portion that was attributable to "general damages." As a result, the trial court would not be able to determine whether the jury's award exceeded the statutory limit.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, this remedy traditionally has been viewed as an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Elec. Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

In *Kramer v. Logan County Sch. Dist. No. R-1*, 157 F.3d 620 (8th Cir. 1998), the court ruled that "front pay is an equitable remedy excluded from the statutory limit on compensatory damages provided for in [42 U.S.C.] § 1981a(b)(3)." *Id.* at 626.

Although the Civil Rights Act of 1991 expressly limits the amount of compensatory and punitive damages depending upon the size of the employer, section 102 of the Act expressly states that the jury shall not be advised on any such limitation. Instead, the trial court will simply reduce the verdict by the amount of any excess.

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here.

3. Select the bracketed language that corresponds to the burden-of-proof instruction given.

4. When certain benefits, such as employer-subsidized health insurance, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchased substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161-62 (7th Cir. 1981); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *See Fariss v. Lynchburg Foundry Co.*, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

5. In some cases, the defendant will assert some independent post-discharge reason - such as a plant closing or sweeping reduction in force - as to why the plaintiff would have been terminated in any event before trial. *See*, *e.g.*, *Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 511 (W.D. Mo.

1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). In those cases, this instruction must be modified to submit this issue for the jury's determination.

6. The trial court may decide to set a time limit beyond which an award of future damages would be impermissibly speculative. *See Hybert v. Hearst Corp.*, 900 F.2d 1050, 1056-57 (7th Cir. 1990); *Snow v. Pillsbury Co.*, 650 F. Supp. 299, 300-01 (D. Minn. 1986) (ADEA case in which front pay was limited to three years); *see also Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1062 (8th Cir. 1988) (district court awarded front pay in lieu of reinstatement; the amount of front pay awarded was determined by the district court and was nearly identical to amount of back pay). *But cf. Neufeld v. Searle Lab.*, 884 F.2d 335, 341 (8th Cir. 1989) (in age discrimination cases, if reinstatement is deemed by the court in its equitable powers to be inappropriate, plaintiff is presumptively entitled to front pay through normal retirement age unless employer proves evidence to the contrary).

7. Front pay is essentially an equitable remedy "in lieu of" reinstatement and is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). If the issue of front pay is submitted to the jury, the jury's determination may be binding. *See Doyne v. Union Elec. Co.*, 953 F.2d 447, 451 (8th Cir. 1992). If front pay is awarded, it should be excluded from the statutory limit on compensatory damages provided for in 42 U.S.C. § 1981a(b)(3). *See Kramer v. Logan County Sch. Dist. No. R-1*, 157 F.3d 620, 625-26 (8th Cir. 1998).

8. Under the 1991 amendments to Title VII, a prevailing plaintiff may recover damages for mental anguish and other personal injuries. The types of damages mentioned in § 102 of the Civil Rights Act of 1991 include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(b)(3) (1994)). *See also* Model Instruction 4.51, *infra*, for a list of some of those damages.

9. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Fieldler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-809 (8th Cir. 1982).

10. This paragraph may be given at the trial court's discretion.

5.03 TITLE VII - DISPARATE TREATMENT - NOMINAL DAMAGES

If you find in favor of plaintiff under Instruction ____[1] and if you answer "no" in response to Instruction ____[2], but you find that plaintiff's damages have no monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).[3]

Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some cases, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. Similarly, in a sexual harassment case in which the plaintiff does not suffer any lost wages or benefits, the jury may find for the plaintiff but award no actual damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

Notes on Use

1. Fill in the number or title of the essential elements instruction (5.01) here.

2. Fill in the number or title of the "same decision" instruction (5.01A) here.

3. One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *See Dean v. Civiletti*, 670 F.2d 99, 101 (8th Cir. 1982) (Title VII); *cf. Cowans v. Wyrick*, 862 F.2d 697-99 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

5.04 TITLE VII - DISPARATE TREATMENT - PUNITIVE DAMAGES

In addition to actual [and nominal] damages mentioned in the other instructions, the law permits the jury under limited circumstances to award an injured person punitive damages.

If you find in favor of plaintiff under Instruction _____,[1] and if you answer "no" in response to Instruction _____,[2] then you must decide whether defendant acted with malice or reckless indifference to plaintiff's right not to be discriminated against[3] on the basis of [his/her] (sex).[4] Defendant acted with malice or reckless indifference if:

> it has been proved by the [(preponderance) or (greater weight)] of the evidence that [insert the name(s) of the defendant or manager[5] who terminated[6] plaintiff] knew that the (termination)[5] was in violation of the law prohibiting (sex) discrimination, or acted with reckless disregard of that law.

[However, you may not award punitive damages if it has been proved by the [(preponderance) or (greater weight)] of the evidence [that defendant made a good-faith effort to comply with the law prohibiting (sex)[4] discrimination]][7].

If you find that defendant acted with malice or reckless disregard and did not make a good-faith effort to comply with the law, then, in addition to any actual [or nominal] damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or to deter defendant and others from like conduct in the future. Whether to award plaintiff punitive damages, and the amount of those damages, are within your discretion.

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.][8]

Committee Comments

Under the Civil Rights Act of 1991, a Title VII plaintiff may recover damages by showing that the defendant engaged in discrimination "with malice or with reckless indifference to [his or her] federally protected rights." *See* 42 U.S.C. § 1981a(b)(1). *See also* Model Instruction 4.53, *infra*, on punitive damages and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In 1999, the United

States Supreme Court explained that the terms "malice" and "reckless" ultimately focus on the actor's state of mind. *Kolstad v. American Dental Association*, 527 U.S. 526, 535 (1999). The Court added that the terms pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *Id.* To be liable for punitive damages, the employer must at least discriminate in the face of a perceived risk that its actions will violate federal law. *Id.* at 536. Rejecting the conclusion of the lower court that punitive damages were limited to cases involving intentional discrimination of an "egregious" nature, the Court held that a plaintiff is not required to show egregious or outrageous discrimination independent of the employer's state of mind. *Id.* at 546.

The *Kolstad* case also established a good-faith defense to place limits on an employer's vicarious liability for punitive damages. Recognizing that Title VII and the ADA are both efforts to promote prevention of discrimination as well as remediation, the Court held that an employer may not be vicariously liable for the discriminatory decisions of managerial agents where those decisions are contrary to the employer's good-faith efforts to comply with Title VII or the ADA. *Id.* at 545. The Court does not clarify which party has the burden of proof on the issue of good faith.

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2 Fill in the number or title of the "same decision" instruction if applicable.

3. Although a finding of discrimination ordinarily subsumes a finding of intentional misconduct, this language is included to emphasize the threshold for recovery of punitive damages. Under the Civil Rights Act of 1991, the standard for punitive damages is whether the defendant acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights." CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(b)(1)).

4. This instruction is designed for use in a gender discrimination case. It must be modified if other forms of discrimination are alleged.

5. Use the name of the defendant, the manager who took the action, or other descriptive phrase such as "the manager who fired plaintiff."

6. This language is designed for use in a discharge case. In a "failure to hire," "failure to promote," "demotion," or "constructive discharge" case, the language must be modified.

7. Use this phrase only if the good faith of defendant is to be presented to the jury. This two-part test was articulated by the United States Supreme Court in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). For a discussion of the case, see the Committee Comments. It is not clear from the case who bears the risk of nonpersuasion on the good-faith issue. The

Committee predicts that case law will place the burden on the defendant to raise the issue and prove it.

8. The bracketed language is available for use if punitive damage claims are submitted against more than one defendant.

5.05 TITLE VII - DISPARATE TREATMENT - VERDICT FORM

VERDICT

Note: Complete the following paragraph by writing in the name required by your verdict.

On the [(sex)[1] discrimination][2] claim of plaintiff [Jane Doe], [as submitted in Instruction ____][3], we find in favor of:

_____

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

Note: Answer the next question only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved by the [(greater weight) (preponderance)][4] of the evidence that defendant would have discharged plaintiff regardless of [his/her] (sex)?[5]

_____Yes _____No
(Mark an "X" in the appropriate space)

Note: Complete the following paragraphs only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We find plaintiff's lost wages and benefits through the date of this verdict to be:

$_____ (stating the amount or, if none, write the word "none").

We find plaintiff's other damages, excluding lost wages and benefits, to be:

$_____ (stating the amount [or, if you find that plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar ($1.00)]).

[We assess punitive damages against defendant, as submitted in Instruction ____, as follows:

$_____ (stating the amount or, if none, write the word "none").][6]

_____
Foreperson

Dated: _____

Employment Cases -- Element and Damage Instructions

Notes on Use

1. This verdict form is designed for use in a gender discrimination case. It must be modified if the plaintiff is claiming discrimination based on race, religion, or some other prohibited factor.

2. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.

3. The number or title of the "essential elements" instruction may be inserted here. *See infra* Model Instruction 5.01.

4. This question submits the "same decision" issue to the jury. *See infra* Model Instruction 5.01A.

5. Select the bracketed language that corresponds to the burden-of-proof instruction given.

6. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See infra* Model Instruction 5.04.

5.10 DISPARATE TREATMENT CASES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA")
Introductory Comment

The following instructions are designed for use in "disparate treatment" cases brought pursuant to the Age Discrimination in Employment Act. In the interests of simplicity and uniformity, the model instruction on the issue of liability utilizes a motivating-factor/same-decision format for all cases. *See* Introductory Note to Section 5. Nevertheless, if the trial court believes it is appropriate to distinguish between a mixed motive case and a pretext case, Model Instruction 5.91, *infra*, contains a sample pretext instruction. Moreover, if the trial court is inclined to adhere to a pretext/mixed motive distinction but cannot determine how to categorize a particular case, Model Instruction 5.92, *infra*, contains a set of special interrogatories designed to elicit a complete set of findings for post-trial analysis.

5.11 ADEA - DISPARATE TREATMENT - ESSENTIAL ELEMENTS (Mixed Motive Case)*

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's age discrimination claim][2] if all the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, defendant [discharged][4] plaintiff; and

Second, plaintiff's age was a motivating factor[5] in defendant's decision.

However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, or if it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have [discharged] plaintiff regardless of [his/her] age.

Committee Comments

* For a pretext case, the format of Model Instruction 5.91, *infra*, is recommended.

This instruction is designed to submit the issue of liability in "disparate treatment" cases brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994). The burden-shifting analysis used in this instruction had been adopted by the Supreme Court in "mixed motive" cases under both Title VII and 42 U.S.C. § 1983. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977). Moreover, a similar burden-shifting approach has been legislatively adopted in all Title VII cases by virtue of the Civil Rights Act of 1991. *See* Introductory Note to Section 5.

To be sure, there is an important difference between Title VII cases and ADEA cases in the use of this format. In Title VII cases, the plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor" in the challenged employment decision, and a finding that the employer would have made the "same decision" in the absence of any discriminatory motive precludes an award of damages or reinstatement, but does not preclude an award of attorney fees or equitable relief. 42 U.S.C. § 2000e-2(m). It is unclear whether the same result would occur in an age discrimination case. *See Fast v. Southern Union Co., Inc.*, 149 F.3d 885, 889 (8th Cir. 1998) and *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (same) (citing *Fast*).

At the court's option, a short statement which defines the Age Discrimination in Employment Act may be included at the beginning of this instruction or as a separate instruction. The following language, based on *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985), is recommended:

Under the Age Discrimination in Employment Act, it is unlawful for an employer to make an employment decision on the basis of an individual's age when that individual is 40 years of age or older.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

5. The Committee believes that the phrase "motivating factor" should be defined. *See infra* Model Instruction 5.96.

5.12 ADEA - DISPARATE TREATMENT - ACTUAL DAMAGES

If you find in favor of plaintiff [under Instruction _____,][1] then you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)][2] of the evidence will fairly and justly compensate plaintiff for any wages and fringe benefits[3] you find plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge], through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by plaintiff during that time.

[You are also instructed that plaintiff has a duty under the law to "mitigate" [his/her] damages--that is, to exercise reasonable diligence under the circumstances to minimize [his/her] damages. Therefore, if you find by the [(greater weight) or (preponderance)] of the evidence, that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [him/her], you must reduce [his/her] damages by the amount of the wages and fringe benefits [he/she] reasonably would have earned if [he/she] had sought out or taken advantage of such an opportunity.][4]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][5]

Committee Comments

The goal of a damages award in an age discrimination case is to put the plaintiff in the same economic position he would have been in but for the unlawful employment decision. This instruction is designed to submit the standard back pay formula of lost wages and benefits *minus* interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits, and pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451-52 (8th Cir. 1992) (holding that pension benefits

are a "collateral source benefit"); *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 627 (6th Cir. 1983) (same). *But cf. Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same).

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See*, *e.g.*, *Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 511 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction which submits this issue in more direct terms.

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *See Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

4. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

5. This paragraph may be given at the trial court's discretion.

5.13 ADEA - DISPARATE TREATMENT - NOMINAL DAMAGES

[Nominal damages normally are not allowed in ADEA disparate treatment cases.]

Committee Comments

Recoverable damages in ADEA cases are limited to lost wages and benefits and in most cases, it will be undisputed that plaintiff has some actual damages. Although case law does not clearly authorize this remedy in age discrimination cases, a nominal damage instruction may be considered in appropriate cases. For example, if the plaintiff was given six months severance pay and failed to secure subsequent employment during that period, the jury may find that an award of actual damages would be inappropriate because of the plaintiff's "failure to mitigate."

In an "age harassment" case where the plaintiff claims that he or she was transferred to a less desirable position, but admits there was no loss in pay or benefits, the primary remedy at stake would be an injunction returning the plaintiff to his or her prior position. Similarly, in a discharge cases in which it is undisputed that the plaintiff suffered no actual damages, because he or she was able to secure immediately a better paying job, the primary remedy at stake would be reinstatement. Given the "equitable" nature of injunctive relief and reinstatement, these relatively rare cases should not be tried to a jury since there is no claim for legal relief. *See generally EEOC v. Emory Univ.*, 47 Fair Empl. Prac. Cas. (BNA) 1770, 1771, 1998 WL 156247 at *2 (N.D. Ga. 1988); *McClaren v. Emory Univ.*, 705 F. Supp. 563, 568 (N.D. Ga. 1988). Most cases that allow nominal damages just assume they are permissible without much discussion of the issue. *See e.g., Drez v. E.R. Squibb & Sons, Inc.*, 674 F. Supp. 1432, 1438 (D. Kan. 1987) (ADEA); *Graefenhain v. Pabst Brewing Co.*, 670 F. Supp. 1415, 1416 (E.D. Wis. 1987) (ADEA).

If nominal damages are submitted, the verdict form must permit the jury to make that finding.

5.14 ADEA - DISPARATE TREATMENT - WILLFULNESS

If you find in favor of plaintiff under Instruction _____,[1] then you must decide whether the conduct of defendant was "willful." You must find defendant's conduct was willful if you find by the [(greater weight) or (preponderance)][2] of the evidence that, when defendant [discharged][3] plaintiff, defendant knew [the discharge] was in violation of the federal law prohibiting age discrimination, or acted with reckless disregard of that law.

Committee Comments

The standard set forth in the instruction is consistent with that mandated by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). *See also Spencer v. Stuart Hall Co., Inc.*, 173 F.3d 1124 (8th Cir. 1999). For a discussion of the evidence necessary to justify a submission on the issue of wilfulness, *see Maschka v. Genuine Parts Co.,* 122 F.3d 566 (8th Cir. 1997) and *Spencer v. Stuart Hall Co., Inc.*, 174 F.3d 1124 (8th Cir. 1999).

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. Select the bracketed language which corresponds to the burden-of-proof instruction given.

3. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, or where the plaintiff resigned but claims he was "constructively discharged," the instruction must be modified.

5.15 ADEA - DISPARATE TREATMENT - VERDICT FORM

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [age discrimination][1] claim of plaintiff [John Doe], [as submitted in Instruction _____][2], we find in favor of

_____

(Plaintiff John Doe) or (Defendant XYZ, Inc.)

Note: Complete the following paragraphs only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's damages to be:

$_____ (stating the amount or, if none, write the word "none").[3]

Was defendant's conduct "willful" as that term is defined in Instruction _____?[4]

Yes _____ No _____

(Place an "X" in the appropriate space.)

_____

Foreperson

Dated: _____

Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential elements" instruction should be inserted here.

3. This paragraph must be modified if the issue of nominal damages is submitted. *But see infra* Committee Comments, Model Instruction 5.13.

4. The number or title of the instruction defining "willfulness" should be inserted here. *See infra* Model Instruction 5.14.

5.20 RACE DISCRIMINATION CASES UNDER 42 U.S.C. § 1981
Introductory Comment

Section 1981 of Title 42, United States Code, which prohibits race discrimination in the making and enforcement of contracts, provides a cause of action for race discrimination in employment claims. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *see also Swapshire v. Baer*, 865 F.2d 948 (8th Cir. 1989). Race discrimination claimants often join claims under § 1981 with claims under Title VII because § 1981, unlike Title VII, does not limit the recovery of compensatory and punitive damages. If the plaintiff joins a jury-triable claim under Title VII with a § 1981 claim, the Committee recommends the use of the 5.01 series of instructions and accompanying verdict form. Although there is a distinction between Title VII and § 1981 in terms of the threshold for liability, the 5.01 series of instructions will yield all of the required findings for a § 1981 case.

In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court restricted the applicability of § 1981 in the employment context to claims arising out of the formation of the employment relationship--in other words, hiring claims and some types of promotion claims. *See Foster v. University of Arkansas*, 938 F.2d 111, 113 (8th Cir. 1991); *Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947 (8th Cir. 1991). However, *Patterson* was legislatively overruled by the Civil Rights Act of 1991, which expressly provides that discharge and harassment claims may be brought under § 1981. In *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992), the Eighth Circuit held that section 101 of the 1991 amendments (overruling *Patterson*), did not apply retroactively to cases pending at the time of their enactment. *See also Huey v. Sullivan*, 971 F.2d 1362 (8th Cir. 1992) (holding that section 114 of the 1991 Act authorizing interest on back pay, and section 113 allowing shifting of expert witness fees, are not retroactive), *cert. denied*, 511 U.S. 1068 (1994).

The following instructions are designed for use in all cases brought pursuant to 42 U.S.C. § 1981. In the interests of simplicity and uniformity, the model instruction on the issue of liability utilizes a motivating-factor/same-decision format for all cases. *See* Introductory Note to Section 5. Nevertheless, if the trial court believes it is appropriate to distinguish between a mixed motive case and a pretext case, Model Instruction 5.91, *infra*, contains a sample pretext instruction. Moreover, if the trial court is inclined to adhere to a pretext/mixed motive distinction but cannot determine how to categorize a particular case, Model Instruction 5.92, *infra*, contains a set of special interrogatories designed to elicit a complete set of findings for post-trial analysis.

5.21 42 U.S.C. § 1981 - RACE DISCRIMINATION - ESSENTIAL ELEMENTS (Mixed Motive Case)*

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's race discrimination claim][2] if all the following elements have been proved by the [(greater weight) or (preponderance)][3] of the evidence:

First, defendant [failed to hire][4] plaintiff; and

Second, plaintiff's race was a motivating factor[5] in defendant's decision.

However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, or if it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have decided not to [hire] plaintiff regardless of [his/her] race.

Committee Comments

* For a pretext case, the format of Model Instruction 5.91, *infra*, is recommended.

To prevail under section 1981, the plaintiff must establish intentional race discrimination. *Swapshire v. Baer*, 865 F.2d 948, 952 (8th Cir. 1989) (citing *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982)). Consistent with its approach in age discrimination cases, the Committee recommends the use of a motivating-factor/same-decision instruction in all mixed motive section 1981 cases. *See infra* Introductory Note to Section 5; Committee Comments, Model Instruction 5.11. Under this approach, the jury must determine whether discrimination was a causal factor in the challenged employment decision, although the risk of nonpersuasion on this issue ultimately rests with the defendant.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. This instruction is designed for use in a "failure to hire" case. In a discharge or "failure to promote" case, the instruction must be modified. In "constructive discharge" cases, *see infra* Model Instruction 5.93.

5. The Committee believes that the phrase "motivating factor" should be defined. *See infra* Model Instruction 5.96.

5.22 42 U.S.C. § 1981 - RACE DISCRIMINATION - ACTUAL DAMAGES

If you find in favor of plaintiff [under Instruction _____][1], then you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)][2] of the evidence will fairly and justly compensate [him/her] for damages you find [he/she] sustained as a direct result of defendant's conduct as described in Instruction _____.[1] Damages include wages or fringe benefits you find plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on (fill in date of discharge), through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by plaintiff during that time.][3] Damages also may include [list damages supported by the evidence].[4]

[You are also instructed that plaintiff has a duty under the law to "mitigate" [his/her] damages--that is, to exercise reasonable diligence under the circumstances to minimize [his/her] damages. Therefore, if you find by the [(greater weight) or (preponderance)] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [him/her], you must reduce [his/her] damages by the amount of the wages and fringe benefits plaintiff reasonably could have earned if [he/she] had sought out or taken advantage of such an opportunity.][5]

[Remember, throughout your deliberations, you must not engage in any speculations, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][6]

Committee Comments

This instruction is designed to submit the standard back pay formula of lost wages and benefits *minus* interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). Moreover, because § 1981 is open-ended in the types of damages which may be recovered, this instruction also permits the recovery of general damages for pain, suffering, humiliation, and the like. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989). Unlike Title VII cases under the Civil Rights Act of 1991, there is no "cap" on damages under section 1981.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front

pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus.*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible), *cert. denied*, 480 U.S. 906 (1987); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir.) (unemployment benefits not deductible), *cert. denied*, 479 U.S. 972 (1986); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same), *cert. denied*, 466 U.S. 950 (1984). *But cf. Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion), *cert. denied*, 495 U.S. 948 (1990); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same), *cert. denied*, 430 U.S. 911 (1977).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See*, *e.g.*, *Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction which submits this issue in more direct terms.

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. Select the bracketed language which corresponds to the burden-of-proof instruction given.

3. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th

Cir. 1981), *overruled on other grounds*, 860 F.2d 834 (7th Cir. 1988); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *Fariss*, 769 F.2d at 964-65. The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

4. In section 1981 cases, a prevailing plaintiff may recover damages for mental anguish, damage to reputation, or other personal injuries. *See Wilmington v. J.I. Case Co.*, 793 F.2d 909, 921 (8th Cir. 1986). The specific elements of damages set forth in this instruction are similar to those found in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1977A(b)(3). *See infra* Model Instruction 5.02 n.8.

5. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

6. This paragraph may be given at the trial court's discretion.

5.23 42 U.S.C. § 1981 - RACE DISCRIMINATION - NOMINAL DAMAGES

If you find in favor of plaintiff under Instruction _____[1], but you find that plaintiff's damages have no monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).[2]

Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some cases, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

If nominal damages are submitted, the verdict form must contain a line where the jury can make that finding.

An award of nominal damages can support a punitive damage award. *See Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 548 (8th Cir. 1984) (§ 1983 case).

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

5.24 42 U.S.C. § 1981 - RACE DISCRIMINATION - PUNITIVE DAMAGES

In addition to actual damages, the law permits the jury under certain circumstances to award the injured person punitive damages in order to punish the defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

If you find in favor of plaintiff and against defendant [name], [and if you find by the [(greater weight) or (preponderance)][1] of the evidence that plaintiff's firing was motivated by evil motive or intent, or that defendant was callously indifferent to plaintiff's rights,][2] then, in addition to any other damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or deter the defendant and others from like conduct in the future. Whether to award plaintiff punitive damages and the amount of those damages are within your sound discretion.

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.][3]

Committee Comments

Punitive damages are recoverable in section 1981 actions. *Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 921-22 (8th Cir. 1986). *See infra* Model Instruction 4.53, for additional comments on punitive damages and factors that may be considered.

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given.

2. Because a finding of liability necessarily entails a finding of "intentional discrimination," *see Swapshire v. Baer*, 865 F.2d 948, 952 (8th Cir. 1989), a substantial argument can be made that no additional finding should be required before the jury may consider the issue of punitive damages. *See Smith v. Wade*, 461 U.S. 30 (1983). Nevertheless, the court may want to submit the bracketed language to emphasize the extraordinary nature of punitive damages. *See Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489-90 (4th Cir.) (indicating that not every section 1981 claim "calls for submission of this extraordinary remedy to the jury"), *cert. denied*, 488 U.S. 996 (1988). The optional language is derived from *Smith v. Wade*. *See also Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1181 (10th Cir. 1989) (punitive damages recoverable only if discrimination was "malicious,

willful, and [sic] in gross disregard of [plaintiff's] rights"); *Stephens*, 848 F.2d at 489-90 (requiring malice, evil intent, or callous indifference); *Beauford v. Sisters of Mercy-Province, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir.) (requiring malice, evil intent, or callous, reckless or egregious disregard of plaintiff's rights), *cert. denied*, 484 U.S. 913 (1987).

3. Use this language if there are multiple defendants.

5.25 42 U.S.C. § 1981 - RACE DISCRIMINATION - VERDICT FORM

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [race discrimination][1] claim of plaintiff [John Doe], as submitted in Instruction _____[2], we find in favor of

_____

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

Note: Complete the following paragraphs only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's damages as defined in Instruction _____[3] to be:

$_____ (stating the amount or, if none, write the word "none")[4] (stating the amount, or if you find that plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).[5]

We assess punitive damages against defendant (name), as submitted in Instruction _____,[6] as follows:

$_____ (stating the amount or, if none, write the word "none").

_____
Foreperson

Dated: _____

Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential elements" instruction should be inserted here.

3. The number or title of the "actual damages" instruction should be inserted here.

4. Use this phrase if the jury has not been instructed on nominal damages.

5. Include this paragraph if the jury is instructed on nominal damages.

6. The number or title of the "punitive damages" instruction should be inserted here.

5.30 DISCRIMINATION BY PUBLIC EMPLOYERS UNDER 42 U.S.C. § 1983
Introductory Comment

Discrimination claims against public employers are often brought under 42 U.S.C. § 1983 as well as Title VII. *E.g., Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227 (8th Cir. 1987); *Hervey v. City of Little Rock*, 787 F.2d 1223 (8th Cir. 1986). Section 1983 historically included three components which Title VII did not contain: (1) the right to a jury trial; (2) the availability of general damages for humiliation, loss of reputation, and the like; and (3) the availability of punitive damages against individual defendants. Although the Civil Rights Act of 1991 has eliminated these differences, § 1983 claims will remain distinctive in two respects: (1) § 1983 does not require exhaustion of the EEOC administrative process; and (2) § 1983 does not place a cap on compensatory and punitive damages. The theory of liability in a § 1983 discrimination claim is that discrimination on the basis of race, gender, or religion constitutes a deprivation of equal protection and, thus, violates the Fourteenth Amendment. The Committee expresses no position on the issue of whether discrimination on the basis of age or disability is within the purview of § 1983.

The following instructions are designed for use in all discrimination cases brought pursuant to 42 U.S.C. § 1983. In the interests of simplicity and uniformity, the model instruction on the issue of liability utilizes a motivating-factor/same-decision format for all cases. *See* Introductory Note to Section 5. Nevertheless, if the trial court believes it is appropriate to distinguish between a mixed motive case and a pretext case, Model Instruction 5.91, *infra*, contains a sample pretext instruction. Moreover, if the trial court is inclined to adhere to a pretext/mixed motive distinction but cannot determine how to categorize a particular case, Model Instruction 5.92, *infra*, contains a set of special interrogatories designed to elicit a complete set of findings for post-trial analysis.

5.31 42 U.S.C. § 1983 - ESSENTIAL ELEMENTS (Mixed Motive Case)*

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's (sex)[2] discrimination claim][3] if both of the following elements have been proved by the [(greater weight) or (preponderance)][4] of the evidence:

First, defendant [discharged][5] plaintiff; and

Second, plaintiff's (sex) was a motivating factor[6] in defendant's decision[; and

Third, defendant was acting under color of state law].[7]

However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, or if it has been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have [discharged] plaintiff regardless of [his/her] (sex).

Committee Comments

* For a pretext case, the format of Model Instruction 5.91, *infra*, is recommended.

To prevail on a section 1983 discrimination claim, the plaintiff must prove intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 240 (1976). This intent to discriminate must be a causal factor in the defendant's employment decision. *Tyler v. Hot Springs School Dist. No. 6*, 827 F.2d 1227, 1230-31 (8th Cir. 1987). Consistent with its approach in age discrimination and race discrimination cases, the Committee recommends the use of a motivating-factor/same-decision instruction in § 1983 cases. *See infra* Introductory Note to Section 5; Committee Comments, Model Instructions 5.11, 5.21, *infra*; *see generally Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 282-87 (1977).

Notes on Use

1. Use this phrase if there are multiple defendants.

2. This instruction is designed for use in a gender discrimination case. It must be modified if the plaintiff is claiming discrimination on the basis of race, religion, or other unlawful basis.

3. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

4. Select the bracketed language which corresponds to the burden-of-proof instruction given.

5. This instruction is designed for use in a discharge case. In a "failure to hire" "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

6. The Committee believes that the phrase "motivating factor" should be defined. *See infra* Model Instruction 5.96.

7. Use this language if the issue of whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction.

5.32 42 U.S.C. § 1983 - ACTUAL DAMAGES

If you find in favor of plaintiff under Instruction _____,[1] then you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)][2] of the evidence will fairly and justly compensate plaintiff for any actual damages you find plaintiff sustained as a direct result of defendant's conduct as submitted in Instruction _____.[3] Actual damages include any wages or fringe benefits you find plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge], through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by plaintiff during that time.[4] Actual damages also may include [list damages supported by the evidence].[5]

[You are also instructed that plaintiff has a duty under the law to "mitigate" his damages--that is, to exercise reasonable diligence under the circumstances to minimize his damages. Therefore, if you find by the [(greater weight) or (preponderance)] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to him, you must reduce his damages by the amount he reasonably could have avoided if he had sought out or taken advantage of such an opportunity.][6] [Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][7]

Committee Comments

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). Moreover, because § 1983 damages are not limited to back pay, the instruction also permits the recovery of general damages for pain, suffering, humiliation, and the like.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus.,* 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Elec. Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same). *But cf. Blum v. Witco Chem. Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See*, *e.g.*, *Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction which submits this issue in more direct terms.

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. Select the bracketed language which corresponds to the burden-of-proof instruction given.

3. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

4. This sentence should be used to guide the jury in calculating the plaintiff's economic damages. In section 1983 cases, however, a prevailing plaintiff may recover actual damages for emotional distress and other personal injuries. *See Carey v. Piphus*, 435 U.S. 247 (1978).

5. In section 1983 cases, a prevailing plaintiff may recover damages for mental anguish and other personal injuries. The specific elements of damages that may be set forth in this instruction are similar to those found in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981a(b)(3). *See infra* Model Instructions 5.02 n.8, and 4.51.

6. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

7. This paragraph may be given at the trial court's discretion.

5.33 42 U.S.C. § 1983 - NOMINAL DAMAGES

If you find in favor of plaintiff under Instruction _____[1], but you find that plaintiff's damages have no monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).[2]

Committee Comments

Most employment discrimination cases involve lost wages and benefits. Nevertheless, a nominal damage instruction should be given in appropriate cases, such as where a plaintiff claiming a discriminatory harassment did not sustain any loss of earnings. *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 542-43, 548 (8th Cir. 1984).

An award of nominal damages can support a punitive damage award. *See Goodwin*, 729 F.2d at 548.

If nominal damages are submitted, the verdict form must contain a line where the jury can make that finding.

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

5.34 42 U.S.C. § 1983 - PUNITIVE DAMAGES

In addition to actual damages, the law permits the jury under certain circumstances to award the injured person punitive damages in order to punish the defendant[1] for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

If you find in favor of plaintiff and against defendant (name), [and if you find by the [(greater weight) or (preponderance)][2] of the evidence that plaintiff's firing was motivated by evil motive or intent, or that defendant was callously indifferent to plaintiff's rights],[3] then in addition to any damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or to deter defendant and others from like conduct in the future. Whether to award plaintiff punitive damages, and the amount of those damages are within your discretion.

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed such defendants may be the same or they may be different.][4]

Committee Comments

Punitive damages are recoverable under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30 (1983).

Notes on Use

1. Public entities, such as cities, cannot be sued for punitive damages under section 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Consequently, the target of a punitive damage claim must be an individual defendant, sued in his individual capacity.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. *See infra* Model Instruction 5.24 n.2.

4. The bracketed language is available for use if punitive damage claims are submitted against more than one defendant.

5.35 42 U.S.C. § 1983 - VERDICT FORM

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [(sex)[1] discrimination][2] claim of plaintiff [John Doe], as submitted in Instruction _____[3], we find in favor of

_____

(Plaintiff John Doe) or (Defendant Sam Smith)

Note: Complete the following paragraphs only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's (name) damages as defined in Instruction ____[4] to be:

$_____ (stating the amount or, if none, write the word "none")[5] (stating the amount, or if you find that plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).[6]

We assess punitive damages against defendant (name), as submitted in Instruction _____,[7] as follows:

$_____ (stating the amount or, if none, write the word "none").

_____

Foreperson

Dated: _____

Notes on Use

1. This verdict form is designed for use in a gender discrimination claim. It must be modified if the plaintiff is claiming a different form of discrimination.

2. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

3. The number or title of the "essential elements" instruction should be inserted here.

4. The number or title of the "actual damages" instruction should be inserted here.

5. Use this phrase if the jury has not been instructed on nominal damages.

6. Include this paragraph if the jury is instructed on nominal damages.

7. The number or title of the "punitive damages" instruction should be inserted here.

5.40 SEXUAL HARASSMENT CASES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE CIVIL RIGHTS ACT OF 1991
Introductory Comment

The following instructions are designed for use in sexual harassment cases under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986), the United States Supreme Court held that sexual harassment is "a form of sex discrimination prohibited by Title VII." More recently, the Supreme Court addressed the requirements of a sexual harassment claim, *see Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), ruled that same-sex sexual harassment is actionable under Title VII, *see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), and clarified the standards governing an employer's liability in sexual harassment cases, *see Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

According to guidelines promulgated by the Equal Employment Opportunity Commission (EEOC), sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a). Two theories of sexual harassment have been recognized by the courts--"quid pro quo" and "hostile work environment" harassment. Those cases in which the plaintiff claims that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands are generally referred to as "quid pro quo" cases, as distinguished from cases based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *See Burlington Indus.*, 524 U.S. at 751.

Although the Supreme Court has recently stated that the "quid pro quo" and "hostile work environment" labels are no longer controlling for purposes of establishing employer liability, the terms--to the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general--are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. *See Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2265; *accord Newton v. Cadwell Lab.*, 156 F.3d 880, 883 (8th Cir. 1998) (recognizing Supreme Court's statement that "quid pro quo" and "hostile work environment" labels are no longer controlling for purposes of establishing employer liability).

In *Faragher* and *Burlington Industries*, the Supreme Court held that employers are vicariously liable for the discriminatory actions of their supervisory personnel. *Faragher*, 524 U.S. at 777-78; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2261; *accord Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 762 (8th Cir. 1998) (citing *Faragher* and *Burlington Industries*). It is not necessary that those at the highest executive levels receive actual notice before an employer is liable for sexual harassment. To establish liability, however, the Supreme Court differentiated between cases in which an employee suffers an adverse "tangible employment action" as a result of the supervisor's sexual harassment and those cases in which an employee does not suffer a tangible

employment action, but suffers the intangible harm flowing from the indignity and humiliation of sexual harassment. *See Newton*, 156 F.3d at 883 (recognizing distinction between cases in which sexual harassment results in a tangible employment action and cases in which no tangible employment action occurs).

When an employee suffers a tangible employment action resulting from a supervisor's sexual harassment, the employer's liability is established by proof of sexual harassment and the resulting adverse tangible employment action taken by the supervisor. *See Faragher*, 524 U.S. at ___, 118 S. Ct. at 2292-93; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270. *See also Newton*, 156 F.3d at 883. No affirmative defense is available to the employer in those cases. *See Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 n.6 (8th Cir. 1998) (citing *Faragher*, 524 U.S. ___, 118 S. Ct. at 2293; *Burlington Indus*., 524 U.S. at ___, 118 S. Ct. at 2270).

In cases where no tangible employment action has been taken by the supervisor, the defending employer may interpose an affirmative defense to defeat liability or damages. That affirmative defense "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270. *See also Taco Bell*, 156 F.3d at 887-88 (quoting *Faragher* and *Burlington Industries*); *Rorie*, 151 F.3d at 762 (quoting same).

Whether an individual is a "supervisor" for purposes of analyzing vicarious liability under *Faragher* and *Burlington Industries* may be a contested issue. *Compare Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 800 (8th Cir. 1998) (lead person was "demonstratively not a part of [defendant's] management") *with id.*, 156 F.3d at 801 (J. Gibson, J., dissenting) (lead person was defendant's "agent" for purposes of reporting complaints and deposition testimony showed that lead person had supervisory authority over plaintiff and alleged harasser).

In light of the new guidance from the Supreme Court, the Committee has drafted instructions for use in three types of cases: (1) those cases in which the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands (Model Instruction 5.41, *infra*); (2) those cases in which the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to sexual harassment by a supervisor sufficiently severe or pervasive to create a hostile working environment (Model Instruction 5.42, *infra*); and (3) those cases in which the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to sexual harassment by non-supervisors sufficiently severe or pervasive to create a hostile working environment (Model Instruction 5.43, *infra*).

5.41 SEXUAL HARASSMENT -- ESSENTIAL ELEMENTS (By Supervisor With Tangible Employment Action)

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of sexual harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex) (gender)][5]; and

Fourth, defendant (specify action(s) taken with respect to plaintiff)[6]; and

Fifth, plaintiff's [(rejection of) (failure to submit to)][7] such conduct was a motivating factor[8] in the decision to (specify action(s) taken with respect to plaintiff).

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim.[9]

Committee Comments

This instruction is designed for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms or conditions of employment that is actionable under Title VII. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, ___, 118 S. Ct. 2257, 2265 (1998). These cases (i.e., cases based on threats which are carried out) are "referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *Id.* at 2264.

The "Unwelcome" Requirement

In sexual harassment cases, the offending conduct must be "unwelcome." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986). In the Eighth Circuit, "conduct must be 'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive." *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986); *see also Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559, 565 (8th Cir. 1992). In the typical

quid pro quo case, where the plaintiff asserts a causal connection between a refusal to submit to sexual advances and a tangible employment action, the "unwelcome" requirement will be met if the jury finds that the plaintiff in fact refused to submit to a supervisor's sexual advances. However, if the court allows a plaintiff to pursue a quid pro quo claim despite his or her submission to the supervisor's sexual advances, the "unwelcome" element is likely to be disputed and must be included.

Conduct Based on Sex

In general, the plaintiff must establish that harassment was "based on sex" in order to prevail on a sexual harassment claim. *See, e.g., Burns v. McGregor Elec. Indus., Inc. [Burns II]*, 989 F.2d 959, 964 (8th Cir. 1993). Because quid pro quo harassment involves behavior that is sexual in nature, there typically will not be a dispute as to whether the objectionable behavior was based on sex. As the Eighth Circuit has stated, "sexual behavior directed at a woman raises the inference that the harassment is based on her sex." *Burns I*, 955 F.2d 559, 564 (8th Cir. 1992).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S.75 (1998); *accord Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996).

Employer Liability

As noted in the Introductory Comment, the Supreme Court has recently held that an employer is "vicariously liable" when its supervisor's discriminatory act results in a tangible employment action. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, ___, 118 S. Ct. 2257, 2269 (1998) ("A tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer."). No affirmative defense is available is such cases. *Id*. at 2270.

Tangible Employment Action

According to the Supreme Court, a "tangible employment action" for purposes of the vicarious liability issue means "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (citations omitted). In most cases, a tangible employment action "inflicts direct economic harm." *Id.* at 762.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's sexual harassment claim (e.g., requests for sexual relations by his or her supervisor) should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of plaintiff's or defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. If the court wants to define this term, the following should be considered: "Conduct is 'unwelcome' if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. Because quid pro quo harassment usually involves conduct that is clearly sexual in nature, this element ordinarily may be omitted from the instruction.

6. Insert the appropriate language depending on the nature of the case (*e.g.*, "discharged," "failed to hire," "failed to promote," or "demoted"). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

7. This instruction is designed for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands. If the plaintiff submitted to the supervisor's sexual advances, and the court allows the plaintiff to pursue such a claim under this instruction rather than requiring plaintiff to submit such a claim under Model Instruction 5.42, *infra*, this instruction must be modified or, alternatively, the trial court may use special interrogatories to build a record on all of the potentially dispositive issues. *See, e.g., Karibian v. Columbia University*, 14 F.3d 773, 778 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994).

8. The Committee recommends that the definition of "motivating factor" set forth in Model Instruction 5.96, *infra*, be given.

9. Because this instruction is designed for use in cases in which tangible employment action has been taken, plaintiff's claim may be analyzed under the "motivating factor/same decision" format used in other Title VII cases. *See infra* Model Instruction 5.01A. For damages instructions and a verdict form, Model Instructions 5.02 through 5.05, *infra*, may be used.

5.42 SEXUAL HARASSMENT -- ESSENTIAL ELEMENTS (By Supervisor With No Tangible Employment Action)

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of sexual harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct or conditions giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex) (gender)][5]; and

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be [(hostile) (abusive)][6]; and

Fifth, at the time such conduct occurred and as a result of such conduct, plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)].

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, [or if defendant is entitled to a verdict under Instruction ____,][7] your verdict must be for the defendant and you need not proceed further in considering this claim.

Committee Comments

This instruction is designed for use in sexual harassment cases where the plaintiff did not suffer any "tangible" employment action such as discharge or demotion, but rather suffered "intangible" harm flowing from a supervisor's sexual harassment that is "sufficiently severe or pervasive to create a hostile work environment." *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742,751 (1998).

It is impossible to compile an exhaustive list of the types of conduct that may give rise to a hostile environment sexual harassment claim under Title VII. Some examples of this kind of conduct include: verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body, sexual prowess, or sexual deficiencies; sexually degrading or vulgar words to describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994); *Hukkanen v. International Union of Operating*

Eng'rs Local No. 101, 3 F.3d 281 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns II]*, 989 F.2d 959 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559 (8th Cir. 1992); *Jones v. Wesco Invs., Inc*., 846 F.2d 1154 (8th Cir. 1988); *Hall v. Gus Constr. Co.,* 842 F.2d 1010 (8th Cir. 1988).

Conduct Based on Sex or Gender

In general, the plaintiff must establish that the alleged offensive conduct was "based on sex." *Burns II*, 989 F.2d at 964. Despite its apparent simplicity, this requirement raises a host of interesting issues. For example, in an historically male-dominated work environment, it may be commonplace to have sexually suggestive calendars on display and provocative banter among the male employees. While the continuation of this conduct may not be directed at a new female employee, it nevertheless may be actionable on the theory that sexual behavior at work raises an inference of discrimination against women. *See Burns I*, 955 F.2d at 564; *see also Stacks v. Southwestern Bell*, 27 F.3d 1316 (8th Cir. 1994) (sexual conduct directed by male employees toward women other than the plaintiff was considered part of a hostile work environment).

The Eighth Circuit also has indicated that conduct which is not sexual in nature but is directed at a woman because of her gender can form the basis of a hostile environment claim. *See, e.g., Gillming v. Simmons Indus.*, 91 F.3d 1168, 1171 (8th Cir. 1996) (jury instruction need not require a finding that acts were explicitly sexual in nature); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (calling a female employee "herpes" and urinating in her gas tank, although not conduct of an explicit sexual nature, was properly considered in determining if a hostile work environment existed); *see also Stacks*, 27 F.3d at 1326 (differential treatment based on gender in connection with disciplinary action supported a female employee's hostile work environment claim); *Shope v. Board of Sup'rs*, 14 F.3d 596 (table), 1993 WL 525598 (4th Cir. Dec. 20, 1993) (rude, disparaging, and "almost physically abusive" conduct based on gender supported a hostile environment claim).

The Eighth Circuit has not directly addressed the issue of whether vulgar or abusive conduct that is directed equally toward men and women can constitute a violation of Title VII. Because sexual harassment is a variety of sex discrimination, some courts have suggested that it is not a violation of Title VII if a manager is equally abusive to male and female employees. For example, in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), *abrogated on other grounds*, 510 U.S. 178 (1993), the court suggested that sexual harassment of all employees by a bisexual supervisor would not violate Title VII. In a similar vein, the district court in *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264 (8th Cir. 1993), granted the employer's motion for summary judgment on the theory that the offending supervisor was abusive toward all employees. Although the Eighth Circuit reversed because the plaintiff had offered evidence that the abuse directed toward female employees was more frequent and more severe than the abuse directed at male employees, *Kopp* suggests that the "equal opportunity harassment" defense can present a question of fact for the jury. *But see Chiapuzio v. BLT Operating Corp.*, 826

F. Supp. 1334 (D. Wyo. 1993) (holding that "equal opportunity harassment" of employees of both genders can violate Title VII).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *accord Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996).

Hostile or Abusive Environment

In order for hostile environment harassment to be actionable, it must be "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))); *accord Parton v. GTE North, Inc.*, 971 F.2d 150, 154 (8th Cir. 1992); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559, 564 (8th Cir. 1992); *Staton v. Maries County*, 868 F.2d 996, 998 (8th Cir. 1989); *Minteer v. Auger*, 844 F.2d 569 (8th Cir. 1988). In *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986), the court explained:

> The harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Henson v. City of Dundee*, 682 F.2d at 904. The plaintiff must show a practice or pattern of harassment against her or him; a single incident or isolated incidents generally will not be sufficient. The plaintiff must generally show that the harassment is sustained and non trivial.

Id. at 749-50; *see Faragher*, 524 U.S. at 788 ("'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (citations omitted).

"[I]n assessing the hostility of an environment, a court must look to the totality of the circumstances." *Stacks*, 27 F.3d at 1327 (citation omitted). In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993), the Court held that a hostile environment claim may be actionable without a showing that the plaintiff suffered psychological injury. In determining whether an environment is hostile or abusive, the relevant factors include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23. *See also Faragher*, 524 U.S. at ___, 118 S. Ct. at 2283 (reiterating relevant factors set forth in *Harris*); *accord Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 (8th Cir. 1998) (citing *Harris*).

Objective and Subjective Requirement

In *Harris,* the Supreme Court explained that "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher*, 524 U.S. at 787 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) ("[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.")); *accord Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 761 (8th Cir. 1998).

Employer Liability

As noted in the Introductory Comment, the Supreme Court has recently held that an employer is "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Unlike those cases in which the plaintiff suffers a tangible employment action, however, in cases where no tangible employment action has been taken by the supervisor, the employer may raise an affirmative defense to liability or damages. *Id*. *See infra* Model Instruction 5.42(A) & Committee Comments.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's sexual harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of plaintiff's or defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. The term "unwelcome" may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: "Conduct is 'unwelcome' if the

plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. As noted in the Committee Comments, there are a number of subsidiary issues which can arise in connection with the requirement that actionable harassment must be "based on sex." If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a "raunchy workplace"--it may be necessary to modify this element to properly frame the issue.

6. Select the word which best describes plaintiff's theory. Both words may be appropriate. This element sets forth the "objective test" for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a "reasonable person." In addition, it may be appropriate to include the factors set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and reiterated in *Faragher v. City of Boca Raton*, 524 U.S. 775, ___, 118 S. Ct. 2275, 2283 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

> In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

7. Because this instruction is designed for cases in which no tangible employment action is taken, the defendant may defend against liability or damages by proving an affirmative defense "of reasonable oversight and of the employee's unreasonable failure to take advantage of corrective opportunities." *Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875, 887 (8th Cir. 1998) (citing *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270). The bracketed language should be used when the defendant is submitting the affirmative defense. *See infra* Model Instruction 5.42(A).

5.42(A) AFFIRMATIVE DEFENSE
(For Use in Cases With No Tangible Employment Action)

Your verdict must be for defendant on plaintiff's claim of sexual harassment if it has been proved by the [greater weight) (preponderance)][1] of the evidence that (a) defendant exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that plaintiff unreasonably failed to take advantage of (specify the preventive or corrective opportunities provided by defendant of which plaintiff allegedly failed to take advantage or how plaintiff allegedly failed to avoid harm otherwise).[2]

Committee Comments

Recently, the United States Supreme Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by [the employee's] supervisor." *Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 762 (8th Cir. 1998) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 777 (1998)). When "no tangible employment action, such as discharge, demotion, or undesirable reassignment" is taken, however, an employer may defend against liability or damages "by proving an affirmative defense of reasonable oversight and of the employee's unreasonable failure to take advantage of corrective opportunities." *Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875, 887 (8th Cir. 1998) (citing *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270)); *accord Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888 (8th Cir. 1998) (citing same); *Newton v. Cadwell Laboratories*, 156 F.3d 880, 883 (8th Cir. 1998) (citing same). The language of the affirmative defense is taken verbatim from the Supreme Court's decisions in *Burlington Industries* and *Faragher*.

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given.

2. According to the Supreme Court, a defendant asserting this affirmative defense must prove not only that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, but also that "plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by defendant or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at ___, 118 S. Ct. at 2270. For purposes of instructing the jury, however, the Committee recommends that the specific preventive or corrective opportunities of which plaintiff allegedly failed to take advantage or the particular manner in which plaintiff allegedly failed to avoid harm be identified.

5.43 SEXUAL HARASSMENT-- ESSENTIAL ELEMENTS (By Nonsupervisor With No Tangible Employment Action)

Your verdict must be for plaintiff [and against defendant _____][1] on plaintiff's claim of sexual harassment if all of the following elements have been proved by the [(greater weight) (preponderance)][2] of the evidence:

First, plaintiff was subjected to (describe alleged conduct or conditions giving rise to plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on plaintiff's [(sex) (gender)][5]; and

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be [(hostile) (abusive)][6]; and

Fifth, at the time such conduct occurred and as a result of such conduct, plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)]; and

Sixth, defendant knew or should have known of the (describe alleged conduct or conditions giving rise to plaintiff's claim)[7]; and

Seventh, defendant failed to take prompt and appropriate corrective action to end the harassment.[8]

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, your verdict must be for the defendant and you need not proceed further in considering this claim.[9]

Committee Comments

This instruction is designed for use in cases where the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to sexual harassment by non-supervisors (as opposed to supervisory personnel) sufficiently severe or pervasive to create a hostile working environment. In such cases (*i.e.*, cases not involving vicarious liability), "[e]mployees have some obligation to inform their employers, either directly or otherwise, of behavior that they find objectionable before employer can be held responsible for failing to correct that behavior, at least ordinarily." *Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 800 (8th Cir. 1998) (decided after the Supreme Court's opinions in *Burlington Industries* and *Faragher*).

Employment Cases -- Element and Damage Instructions

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. The conduct or conditions forming the basis for the plaintiff's sexual harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of plaintiff's or defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. The term "unwelcome" may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: "[Conduct is 'unwelcome'] if the employee did not solicit or invite it and the employee regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. As noted in the Committee Comments, there are a number of subsidiary issues which can arise in connection with the requirement that actionable harassment must be "based on sex." If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a "raunchy workplace"--it may be necessary to modify this element to properly frame the issue.

6. Select the word which best describes plaintiff's theory. Both words may be appropriate. This element sets forth the "objective test" for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a "reasonable person." In addition, it may be appropriate to include the factors set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and reiterated in *Faragher v. City of Boca Raton*, 524 U.S. 775, ___, 118 S. Ct. 2275, 2283 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

> In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

7. As noted in the Committee Comments, there are generally two requirements for establishing employer liability in sexual harassment cases where the plaintiff claims harassment by his or her coworkers rather than by supervisory personnel: (1) the plaintiff must show that the employer knew or should have known of the harassment; and (2) the plaintiff must show that the employer failed to take appropriate action to end the harassment. This element sets forth the first half of the test. As a practical matter, it is unlikely that the defendant will seriously contest both issues: if the employer claims it never knew of the harassment, the question of whether its response was appropriate would be moot; conversely, if the employer's primary defense is that it took appropriate remedial action, the "knew or should have known" element may be moot.

8. As discussed in the Introductory Comment, the Supreme Court's recent opinions with respect to employer liability in sexual harassment cases address only those situations in which a supervisor (as opposed to a non-supervisor) sexually harasses a subordinate. In cases in which the plaintiff alleges sexual harassment by a non-supervisor, the issue of whether courts will leave the burden on plaintiff to prove that the defendant failed to take prompt and appropriate corrective action or whether courts will place the burden on the defendant to prove an affirmative defense that it took prompt and appropriate corrective action as in *Faragher* and *Burlington Industries* is an open question. *See, e.g., Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999) (Barkett, concurring).

9. Because this instruction is designed for use in cases in which no tangible employment action has been taken, plaintiff's claim should not be analyzed under the "motivating factor/same decision" format used in other Title VII cases. *See Stacks v. Southwestern Bell*, 27 F.3d 1316 (8th Cir. 1994). For damages instructions and a verdict form, Model Instructions 5.02 through 5.05, *infra*, should be used in a modified format. For a sample constructive discharge instruction, *see infra* Model Instruction 5.93.

5.50 DISPARATE TREATMENT AND REASONABLE ACCOMMODATION CASES UNDER THE AMERICANS WITH DISABILITIES ACT ("ADA") (Employment Cases Only)

Introduction

The following instructions are designed for use in disability cases under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. The ADA was enacted July 26, 1990, and became effective July 26, 1992. The purposes of the ADA are to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. *See* 42 U.S.C. § 12101(b).

Some of the key issues in those cases include whether an individual has a "disability" as defined in the ADA; whether the individual is "otherwise qualified" for the position; whether the individual can perform the "essential functions" of the job with or without "reasonable accommodations"; and whether the employer has provided "reasonable accommodations." The instructions focus on many of these issues.

These instructions are not intended to cover cases with respect to public accommodations or public services under the ADA. Rather, these instructions are intended to cover only those cases arising under the employment provisions of the ADA.

To establish a prima facie case under the ADA, an aggrieved employee must establish that he or she has a disability as defined in 42 U.S.C. § 12102(2); that he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he or she has suffered adverse employment action because of his or her disability. *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000); *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 574 (8th Cir. 2000); *Snow v. Ridgeway Med. Ctr.*, 128 F.3d 1201, 1206 (8th Cir. 1997); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996); *Price v. S-B Power Tool*, 75 F.3d 362, 365 (8th Cir. 1996).

A "Disability" Under the ADA

Under the ADA, a "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2); *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 948 (8th Cir. 1999); *Snow*, 128 F.3d at 1206; *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997); *Smith v. City of Des Moines*, 99 F.3d 1466, 1474 (8th Cir. 1996).

Although the ADA does not define the key phrases found in subsection (A) of 42 U.S.C. § 12102(2) (*i.e.*, "physical or mental impairment," "major life activity," and "substantially limits"), the regulations implementing the ADA provide guidance on these issues.

"Physical or Mental Impairment"

According to the regulations, a "physical impairment" is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine. 29 C.F.R. § 1630.2(h); *Otting v. J.C. Penney Co.*, 223 F.3d 704, ___ (8th Cir. 2000). A "mental impairment" is any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h).

"Major Life Activity"

The regulations define the term "major life activity" as activities that an average person can perform with little or no difficulty, such as walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, and working. 29 C.F.R. § 1630.2(i); *Otting*, 223 F.3d at 710; *Fjellestad*, 188 F.3d at 948; *Snow*, 128 F.3d at 1207 n.3; *Doane*, 115 F.3d at 627; *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996); *accord Shipley v. City of University City*, 195 F.3d 1020, 1022 (8th Cir. 1999) (citing *Bragdon v. Abbott*, 524 U.S. 624, 638-39 (1998)). Sitting, standing and reaching are also considered major life activities. *Fjellestad*, 188 F.3d at 948 (citing *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997)). *See also Land v. Baptist Med. Ctr.*, 164 F.3d 423, 424 (8th Cir. 1999) (eating is a major life activity); *Weber v. Strippit, Inc.*, 186 F.3d 907, 913-14 (8th Cir. 1999) (shoveling snow, gardening, mowing the lawn, playing tennis, walking up stairs, fishing and hiking do not qualify as major life activities).

Although lifting is also considered a major life activity, a general lifting restriction, without more, is generally insufficient to constitute a significant limitation on any major life activities. *See, e.g., Snow*, 128 F.3d at 1207 ("While lifting is noted under the regulations as a major life activity, a general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA."); *Helfter*, 115 F.3d at 617 (evidence that impairment limits work-related activities such as lifting does not demonstrate triable dispute regarding substantial limitation on major life activity); *Aucutt*, 85 F.3d at 1319 (twenty-five pound lifting restriction, without more, does not constitute a significant restriction on ability to perform major life activities).

The Eighth Circuit has held that reproduction and caring for others are not major life activities under the ADA. *See Krauel v. Iowa Methodist Center*, 95 F.3d 674, 677 (8th Cir. 1996). *But see Bragdon v. Abbott*, 524 U.S. 639, ___, 118 S. Ct. 2196, 2205 (1998) (reproduction is a major life activity for purposes of the ADA).

"Substantially Limiting"

In order for an impairment to be considered "substantially limiting," the individual must be (i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity. 29 C.F.R. § 1630.2(j)(1); *Fjellestad*, 188 F.3d at 948-49; *Snow*, 128 F.3d at 1206 (8th Cir. 1997); *Helfter*, 115 F.3d at 616. The United States Supreme Court has held that a physical or mental impairment that is corrected by medication, the body's own systems, or other measures does not "substantially limit" a major life activity. *See Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *accord Spades v. City of Walnut Ridge*, 186 F.3d 897, 899-900 (8th Cir. 1999) (alleged disability of depression did not substantially limit any of plaintiff's major life activities where plaintiff conceded that resort to medicines and counseling allowed him to function without limitation). *Cf. Otting v. J.C. Penney Co.*, 223 F.3d 704, ___ (8th Cir. 2000) (plaintiff's epilepsy substantially limited one or more major life activities where, despite surgery and medication, seizures were not under control at time of discharge).

The following factors are relevant in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2); *Otting*, 223 F.3d at ___; *Fjellestad*, 188 F.3d at 949; *Snow*, 128 F.3d at 1207; *Helfter*, 115 F.3d at 616; *Aucutt*, 85 F.3d at 1319.

Thus, temporary, non-chronic impairments of short duration with little or no long-term or permanent impact are usually not disabilities. *See Gutridge v. Clure*, 153 F.3d 898, 901-02 (8th Cir. 1998) (citing 29 C.F.R. § 1630 App., § 1630.2(j); *Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir. 1997)).

The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *Snow*, 128 F.3d at 1206 (citing 29 C.F.R. § 1630.2(j)(3)(i)); *Aucutt*, 85 F.3d at 1319 (same); *accord Fjellestad*, 188 F.3d at 949 ("Finding that an individual is substantially limited in his or her ability to work requires a showing that his or her overall employment opportunities are limited."). Rather, a person must show the impairment significantly restricts his or her ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *Snow*, 128 F.3d at 1206-07 (citing 29 C.F.R. § 1630.2(j)(3)(i)); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996) (same); *accord Shipley*, 195 F.3d at 1022-23 (citing *Sutton*, 119 S. Ct. at 2150-52); *Fjellestad*, 188 F.3d at 949.

Knowledge of the Disability

Unlike other discrimination cases, the protected characteristic of the employee in a disability discrimination case may not always be immediately obvious to the employer. As the Seventh Circuit has stated, "It is true that an employer will automatically know of many disabilities. For example, an employer would know that a person in a wheelchair, or with some other obvious physical limitation, had a disability." *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 932 (7th Cir. 1995). Furthermore, it may be that some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability (*e.g.*, an employee who suffers frequent seizures at work likely has some disability). *Id.* at 934. Finally, an employer may actually know of disabilities that are not immediately obvious, such as when an employee asks for an accommodation under the ADA and submits supporting medical documentation. *See id.* at 932.

An employer's mere knowledge of the disability's effects, far removed from the disability itself and with no obvious link to the disability, is generally insufficient to create liability. As one court has aptly stated, "[t]he ADA does not require clairvoyance." *See id.* at 934.

A number of recent Eighth Circuit decisions suggest that an employer must have actual knowledge of an employee's disability before the employer may be exposed to liability. *See, e.g., Miller v. National Casualty Co.*, 61 F.3d 627, 629-30 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg*, 47 F.3d at 934)); *Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that the employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of his disabling condition even though the employer had some awareness of the plaintiff's health problems).

A "Qualified" Individual with a Disability

In order to be protected by the ADA, an individual must be a "qualified individual with a disability." To be a qualified individual, one must be able to perform the essential functions of the job with or without reasonable accommodations. 42 U.S.C § 12111(8); *see also Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000) (determination of qualification involves two-fold inquiry--whether the person meets the necessary prerequisites for the job, such as education, experience and training, and whether the individual can perform the essential job functions with or without reasonable accommodation); *Treanor v. MCI Telecommunications*

Corp., 200 F.3d 570, 574-76 (8th Cir. 2000) (in order for court to assess whether plaintiff is "qualified" within the meaning of the ADA, plaintiff must identify particular job sought or desired).

Essential Functions of the Job

The phrase "essential functions" means the fundamental job duties of the employment position the plaintiff holds or for which the plaintiff has applied. *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir. 1998). "Essential functions" does not include the marginal functions of the position. *Id.* (citing 29 C.F.R. § 1630.2(n)(1)). The EEOC regulations suggest the following may be considered in determining the essential functions of an employment position: (1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions prepared for advertising or used when interviewing applicants for the job; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement if one exists; (6) the work experience of persons who have held the job; and/or (7) the current work experience of persons in similar jobs. 29 C.F.R. § 1630.2(n)(3); *Moritz*, 147 F.3d at 787. *See also Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998) ("An employer's identification of a position's "essential functions" is given some deference under the ADA."); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113-14 (8th Cir. 1995) (discussing "essential functions" and relevant EEOC regulations).

Resolving a conflict among the courts of appeals, the United States Supreme Court held that an ADA plaintiff's application for or receipt of benefits under the Social Security Disability Insurance program neither automatically estops the plaintiff from pursuing his or her ADA claim nor erects a strong presumption against the plaintiff's success under the ADA. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, ___, 119 S. Ct. 1597, 1600 (1999). Nonetheless, to survive a motion for summary judgment, the plaintiff must explain why his or her claim for disability benefits is consistent with the claim that he or she could perform the essential functions of his or her previous job with or without reasonable accommodation. *Id.*; *accord Hill v. Kansas City Area Transportation Authority*, 181 F.3d 891, 893 (8th Cir. 1999). *See also Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084-85 (8th Cir. 2000) (affirming grant of summary judgment to employer in part because plaintiff failed to overcome presumption, created by prior allegation of total disability, that he is not a qualified individual within the meaning of the ADA).

"Reasonable Accommodation"

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999).

Although there is no precise test for determining what constitutes a reasonable accommodation, an accommodation is unreasonable if it imposes undue financial or administrative burdens or

if it otherwise imposes an undue hardship on the operation of the employer's business. 42 U.S.C. § 12112(b)(5)(A); *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999). The "undue hardship" defense is discussed below.

The ADA provides that the concept of "reasonable accommodation" may include: "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications or examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9). *See also Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-24 (8th Cir. 1995) (discussing "reasonable accommodations" and relevant EEOC regulations).

Although part-time work and job restructuring may be considered reasonable accommodations, "[t]his does not mean an employer is required to offer those accommodations in every case." *Treanor*, 200 F.3d at 575. Moreover, although job restructuring is a possible accommodation under the ADA, an employer need not reallocate the essential functions of a job. *Id.*; *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999); *Lloyd*, 207 F.3d at 1084; *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Benson*, 62 F.3d at 1112-13 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)). In addition, an employer is not obligated to hire additional employees or reassign existing workers to assist an employee. *Fjellestad*, 188 F.3d at 950 (citing *Moritz*, 124 F.3d at 788).

Reassignment to a vacant position is another possible accommodation under the ADA. *Benson*, 62 F.3d at 1114 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)); *see also Fjellestad*, 188 F.3d at 950-51 (plaintiff created genuine issue of material fact as to whether employer could have reassigned her to a specific, vacant position). In fact, the Eighth Circuit has recognized that, in certain circumstances, reassignment to a vacant position may be "necessary" as a reasonable accommodation. *See Cravens*, 214 F.3d at 1018. The scope of the reassignment duty is limited, however. *Id.* at 1019. For example, reassignment is an accommodation of "last resort"; that is, the "very prospect of reassignment does not even arise unless accommodation within the individual's current position would pose an undue hardship." *Id.* Moreover, the ADA does not require an employer to create a new position as an accommodation. *Id.*; *see also Treanor*, 200 F.3d at 575 ("[T]he ADA does not require an employer to create a new part-time position where none previously existed."); *Fjellestad*, 188 F.3d at 950 (employer not required to create new position or to create permanent position out of a temporary one). In addition, an employer is not required to "bump" another employee in order to reassign a disabled employee to that position. *Cravens*, 214 F.3d at 1019. Promotion is not required. *Id.* Finally, the employee must be "otherwise qualified" for the reassignment position. *Id.*

An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable

accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

The ADA does not require the preferential treatment of individuals with disabilities in terms of job qualifications as a reasonable accommodation. *See Harris v. Polk County*, 103 F.2d 696, 697 (8th Cir. 1996) (employer lawfully denied job to disabled applicant on basis of criminal record which allegedly had resulted from prior psychological problems because "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees").

For more discussion of "reasonable accommodations" under the ADA, *see infra* Model Instruction 5.51(C) and Committee Comments.

The Interactive Process

Before an employer must make an accommodation for the physical or mental limitation of an employee, the employer must have knowledge that such a limitation exists. *Miller v. National Casualty Co.*, 61 F.3d 627, 629 (8th Cir. 1995); *accord Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 726 (8th Cir. 1999). Thus, it is generally the responsibility of the plaintiff to request the provision of a reasonable accommodation. *Miller*, 61 F.3d at 630 (citing 29 C.F.R. § 1630 App., § 1630.9); *Cannice*, 189 F.3d at 727; *accord Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999) (The burden remains with the plaintiff "to show that a reasonable accommodation, allowing him to perform the essential functions of his job, is possible."); *Mole v. Buckhorn Rubber Prods., Inc.*, 165 F. 3d 1212, 1218 (8th Cir. 1999) (affirming grant of summary judgment for defendant where "only [plaintiff] could accurately identify the need for accommodations specific to her job and workplace" and she failed to do so); *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 689 (8th Cir. 1998) ("Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations." (citation omitted)).

Once the plaintiff has made such a request, the ADA and its implementing regulations require that the parties engage in an "interactive process" to determine what precise accommodations are necessary. *See* 29 C.F.R. § 1630.2(o)(3) & § 1630 App., § 1630.9; *accord Fjellestad*, 188 F.3d at 951. This means that the employer "should first analyze the relevant job and the specific limitations imposed by the disability and then, in consultation with the individual, identify potential effective accommodations." *See Cannice*, 189 F.3d at 727. In essence, the employer and the employee must work together in good faith to help each other determine what accommodation is necessary. *Id.*

Several courts, however, have held that an employer's failure to engage in an interactive process, standing alone, is insufficient to expose the employer to liability under the ADA. *See, e.g., Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 752 (9th Cir. 1998) (and cases cited therein); *accord Cravens*, 214 F.3d at 1021; *Fjellestad*, 188 F.3d at 952 ("We tend to agree with those courts that hold that there is no per se liability under the ADA if an employer fails to engage in an interactive process."); *Cannice*, 189 F.3d at 727.

The Eighth Circuit has recognized that although an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable accommodation was possible, the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith. *See Fjellestad*, 188 F.3d at 952; *Cravens*, 214 F.3d at 1021 (To establish that an employer failed to participate in an interactive process, a disabled employee must show the employer knew about the disability; the employee requested accommodation or assistance; the employer did not make a good faith effort to assist the employee; and the employee could have been reasonably accommodated but for the employer's lack of good faith.). Accordingly, the Circuit held that summary judgment is typically precluded when there is a genuine dispute as to whether the employer acted in good faith and engaged in the interactive process of seeking reasonable accommodations. *See Cravens*, 214 F.3d at 1022; *Fjellestad*, 188 F.3d at 953; *accord Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998) (single telephone conversation between plaintiff and employer "hardly satisfies our standard that the employer make reasonable efforts to assist the employee [and] to communicate with him in good faith").

On the other hand, summary judgment may be appropriate where the employee fails to engage in the interactive process. *See, e.g., Treanor*, 200 F.3d at 575 (plaintiff failed to create a genuine question of fact in dispute on issue of interactive process where plaintiff requested part-time work, defendant indicated that no such position existed, plaintiff failed to identify any particular "suitable" position and there was no evidence that defendant acted in bad faith by failing to investigate further the existence of a reasonable accommodation); *Webster v. Methodist Occupational Health Centers, Inc.*, 141 F.3d 1236 (7th Cir. 1998) (no liability where employee failed to participate in the interactive process required under the ADA); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997) (no liability where plaintiff failed to engage in interactive process after employer offered accommodations in that she did not provide employer with any substantive reasons as to why all five of the proffered accommodations were unreasonable); *Gerdes v. Swift-Eckrich, Inc.*, 949 F. Supp. 1386 (N.D. Iowa 1996) (summary judgment for employer appropriate where responsibility for causing the breakdown of the interactive process rested plainly on plaintiff), *aff'd*, 125 F.3d 634 (8th Cir. 1997).

Similarly, summary judgment may be appropriate in the absence of evidence that the employer failed to make a good faith effort to arrive at a reasonable accommodation for the plaintiff. *See, e.g., Mole*, 165 F.3d at 1218 (affirming grant of summary judgment for employer where "there is no evidence [the employer] failed to make a good faith reasonable effort to help [plaintiff]

determine if other accommodations might be needed."); *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996) ("[W]here, as here, the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodation based on the information it possessed, ADA liability simply does not follow.").

Statutory Defenses

The ADA specifically provides for the following defenses: (1) undue hardship (42 U.S.C. § 12112(b)(5)(A)); (2) direct threat to the health or safety of others in the workplace (42 U.S.C. § 12113(b)); (3) employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)); (4) religious entity (42 U.S.C. § 12113(c)(1)); (5) infectious or communicable disease (42 U.S.C. § 12113(d)(2)); and (6) illegal use of drugs (42 U.S.C. § 12114(a)). The statutory defenses most likely to lead to instruction issues are undue hardship and direct threat. *See infra* Model Instructions 5.53(A) and 5.53(B). The Committee assumes that the burden of proving and pleading these defenses is on the defendant.

Undue Hardship

As set forth above, the ADA provides that an employer need not provide a reasonable accommodation if it can prove that the accommodation would impose an undue hardship on the operation of its business. The term "undue hardship" is defined as "an action requiring significant difficulty or expense," which is to be considered in light of the following factors: (i) the nature and cost of the accommodation; (ii) the employer's financial resources at the facility in question; (iii) the employer's overall financial resources; and (iv) the fiscal relationship of the facility in question with the employer's overall business. 42 U.S.C. § 12111(10).

Direct Threat

The ADA specifically permits employers to reject applicants and terminate employees who pose a "direct threat" to the health or safety of others in the workplace if such direct threat cannot be eliminated by reasonable accommodation. 42 U.S.C. § 12113(b); *see Wood v. Omaha Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994) (insulin-dependent individuals with poorly controlled diabetes were not qualified to serve as school bus drivers).

The courts also have used the "direct threat" doctrine to support the terminations of individuals who assault or threaten co-workers. For example, in *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996), the court upheld the termination of an alcoholic employee who threatened his supervisor. *See also Crawford v. Runyon*, 79 F.3d 743 (8th Cir. 1996) (upholding district court's finding of no pretext in termination of postal worker who threatened to kill his supervisor); *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437 (D. Kan. 1996) (upholding termination of disgruntled employee who threatened to "go postal").

Procedures and Remedies

Pursuant to 42 U.S.C. § 12117, ADA cases generally adopt the procedures and remedy schemes from Title VII cases. *Doane v. City of Omaha*, 115 F.3d 624, 629 (8th Cir. 1997). Accordingly, an EEOC charge and right-to-sue notice typically will be necessary preconditions to an ADA claim. *See* 42 U.S.C. § 2000e-5. By virtue of the Civil Rights Act of 1991, damages under the ADA generally are the same as those available under Title VII. Thus, potential remedies in ADA cases include backpay, compensatory damages, punitive damages, and attorneys' fees. *See* 42 U.S.C. § 1981a.

In ADA cases, a plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor" in the adverse employment decision. *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995). The employer may nevertheless avoid an award of damages or reinstatement by showing that it would have taken the same action in the absence of the impermissible motivating factor. *Id.*; *Doane*, 115 F.3d at 629. In such cases, "remedies available are limited to a declaratory judgment, an injunction that does not include an order for reinstatement or for back pay, and some attorney's fees and costs." *Doane*, 115 F.3d at 629 (quoting *Pedigo*, 60 F.3d at 1301) (citing 42 U.S.C. § 2000e-5(g)(2)(B)(i) & (ii)). *But see Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 397-98 (8th Cir. 1996) (discussing prevailing party for purposes of awarding attorneys' fees).

In addition, the ADA provides a "good faith" defense if an employer "demonstrates good faith efforts" to find a reasonable accommodation with the plaintiff. *See* 42 U.S.C § 1981a(a)(3) and Model Instruction 5.57, *infra*. If the jury finds that the employer has made such efforts, the plaintiff cannot recover compensatory or punitive damages. *See* 42 U.S.C. § 1981a(a)(3).

5.51A ADA - DISPARATE TREATMENT - ESSENTIAL ELEMENTS (ACTUAL DISABILITY)

Your verdict must be for plaintiff and against defendant if all of the following elements have been proved by the [(greater weight) (preponderance)][1] of the evidence:

First, plaintiff had (specify alleged impairment(s));[2] and

Second, such (specify alleged impairment(s)) substantially limited plaintiff's ability to (specify major life activity or activities affected); and[3]

Third, defendant (specify action(s) taken with respect to plaintiff)[4]; and

Fourth, plaintiff could have performed the essential functions[5] of (specify job held or position sought)[6] at the time defendant (specify action(s) taken with respect to plaintiff) and

Fifth, defendant knew[7] of plaintiff's (specify alleged impairment(s)) and plaintiff's (specify alleged impairment(s)) was a motivating factor[8] in defendant's decision to (specify action(s) taken with respect to plaintiff).

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence [or if defendant is entitled to a verdict under (describe instruction)],[9] then your verdict must be for defendant.

Committee Comments

This instruction is designed to submit cases in which the primary issue is whether the plaintiff's disability was a motivating factor in the employment decision. The instruction may be modified if the plaintiff alleges that he or she has a record of a disability. *See* 42 U.S.C. § 12102(2)(B); 29 C.F.R. § 1630.2(g). If the plaintiff alleges that he or she did not have an actual disability, but that he or she was regarded by the defendant as having a disability, *see* 42 U.S.C. § 12102(2)(C), the appropriate instruction for use is Model Instruction 5.51(B), *infra*.

The *McDonnell Douglas* burden-shifting scheme applies in analyzing claims of intentional discrimination under the ADA. *See, e.g., Christopher v. Adam's Mark Hotels*, 137 F.3d 1069, 1071 (8th Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). It is unnecessary and inadvisable, however, to instruct the jury regarding the *McDonnell Douglas* analysis. *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) ("Reference to this complex analysis is not necessary . . . or even recommended."); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir. 1992) ("[T]he *McDonnell Douglas* 'ritual is not well suited as a detailed instruction to the jury' and adds little understanding to deciding the ultimate question of discrimina-

tion.") (quoting *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 (8th Cir. 1985)). Instead, the submission to the jury should focus on the ultimate issues of whether intentional discrimination was a motivating factor in the defendant's employment decision. *See Lang*, 107 F.3d at 1312 ("Model instruction § 5.91 properly focuses on the single ultimate factual issue for the jury--whether the plaintiff is a victim of intentional discrimination . . . .").

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

2. In a typical case, the plaintiff will allege discrimination on the basis of an actual disability. *See* 42 U.S.C. § 12102(2)(A). In such cases, the name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

As discussed in the Committee Comments, however, if the plaintiff contends that he or she had a record of a disability, the language of the instruction will have to be modified. *See* 42 U.S.C. § 12102(2)(B). For cases in which the plaintiff alleges that he or she was regarded by the defendant as having a disability, *see infra* Model Instruction 5.51(B). *See id.* § 12102(2)(C).

3. This element is designed to submit the issue of whether the plaintiff's alleged impairment constitutes a "disability" under the ADA. If necessary, the phrase "substantially limits" may be defined. *See infra* Model Instruction 5.52(C).

4. Insert the appropriate language depending on the nature of the case (*e.g.*,"discharge," "failure to hire," "failure to promote," or "demotion" case). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.59.

5. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52(B).

6. In a discharge or demotion case, specify the position held by the plaintiff. In a failure-to-hire or failure-to-promote case, specify the position for which the plaintiff applied. *See Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575-76 (8th Cir. 2000) (agreeing with district court's

assessment that it could not evaluate whether plaintiff was a qualified individual within the meaning of the ADA because plaintiff failed to identify any particular job for which she was qualified).

7. This language may need to be modified if there is a dispute whether the defendant had adequate knowledge of the plaintiff's impairment. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that an employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of her disabling condition even though the employer had some awareness of the plaintiff's health problems). *See also Miller v. National Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 934 (7th Cir. 1995))). For more discussion on this issue, see section 5.50.

8. The phrase "motivating factor" is the proper phrase to use in the instruction, *see Pedigo v. P.A.M. Transport Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), and the Committee recommends that the definition set forth in Model Instruction 5.96, *infra*, be given.

9. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(c)(1)); infectious or communicable disease (42 U.S.C. § 12113(d)(2)); illegal use of drugs (42 U.S.C. 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

5.51B ADA-- DISPARATE TREATMENT - ESSENTIAL ELEMENTS (PERCEIVED DISABILITY)

Your verdict must be for plaintiff and against defendant if all of the following elements have been proved by the [(greater weight) (preponderance)][1] of the evidence:

First, defendant regarded plaintiff's (specify alleged impairment(s))[2] as substantially limiting plaintiff's ability to (specify major life activity or activities defendant allegedly believed were affected); and[3]

Second, defendant (specify action(s) taken with respect to plaintiff)[4] and

Third, plaintiff could have performed the essential functions[5] of (specify job held or position sought)[6] at the time defendant (specify action(s) taken with respect to plaintiff); and

Fourth, plaintiff's (specify alleged impairment(s)) was a motivating factor[7] in defendant's decision to (specify action(s) taken with respect to plaintiff).

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence [or if defendant is entitled to a verdict under (describe instruction)],[8] then your verdict must be for defendant.

Committee Comments

This instruction is designed to submit cases in which the primary issue is whether the plaintiff's perceived disability was a motivating factor in the employment decision. *See* 42 U.S.C. § 12102(2)(C).

The *McDonnell Douglas* burden-shifting scheme applies in analyzing claims of intentional discrimination under the ADA. *See, e.g., Christopher v. Adam's Mark Hotels*, 137 F.3d 1069, 1071 (8th Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). It is unnecessary and inadvisable, however, to instruct the jury regarding the *McDonnell Douglas* analysis. *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) ("Reference to this complex analysis is not necessary . . . or even recommended."); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir. 1992) ("[T]he *McDonnell Douglas* 'ritual is not well suited as a detailed instruction to the jury' and adds little understanding to deciding the ultimate question of discrimination.") (quoting *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 (8th Cir. 1985)). Instead, the submission to the jury should focus on the ultimate issues of whether intentional discrimination was a motivating factor in the defendant's employment decision. *See Lang*, 107 F.3d at 1312 ("Model instruction § 5.91 properly focuses on the single ultimate factual issue for the jury--whether the plaintiff is a victim of intentional discrimination . . . .").

Employment Cases -- Element and Damage Instructions

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

2. It may be that in the majority of "perceived disability" cases, the plaintiff has an actual impairment, although the impairment does not substantially limit any of the plaintiff's major life activities. *See* 29 C.F.R. § 1630.2(l)(1) (explaining that a person is "regarded as" having an impairment that substantially limits a major life activity "if he or she has a physical or mental impairment that does not substantially limit major life activities but is treated . . . as constituting such limitation").

In such cases, the name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

3. This element is designed to submit the issue of whether the plaintiff has a "disability" within the meaning of the ADA because the defendant regarded plaintiff as having a substantially limiting impairment. *See* 42 U.S.C. § 12102(2)(C). If necessary, the phrase "substantially limits" may be defined. *See infra* Model Instruction 5.52(C).

4. Insert the appropriate language depending on the nature of the case (*e.g.*,"discharge," "failure to hire," "failure to promote," or "demotion" case). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.59.

5. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52(B).

6. In a discharge or demotion case, specify the position held by the plaintiff. In a failure-to-hire or failure-to-promote case, specify the position for which the plaintiff applied. *See Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575-76 (8th Cir. 2000) (agreeing with district court's assessment that it could not evaluate whether plaintiff was a qualified individual within the meaning of the ADA because plaintiff failed to identify any particular job for which she was qualified).

7. The phrase "motivating factor" is the proper phrase to use in the instruction, *see Pedigo v. P.A.M. Transport Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), and the Committee recommends that the definition set forth in Model Instruction 5.96, *infra*, be given.

8. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(c)(1)); infectious or communicable disease (42 U.S.C. § 12113(d)(2)); illegal use of drugs (42 U.S.C. 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

5.51A/B(1) ADA--DISPARATE TREATMENT "SAME DECISION" INSTRUCTION

If you find in favor of plaintiff under Instruction ___,[1] then you must answer the following question in the verdict form[s]: Has it been proved by the [(greater weight) (preponderance)][2] of the evidence that defendant would have (specify action taken with respect to plaintiff) even if defendant had not considered plaintiff's (specify alleged impairment)?

Committee Comments

If a plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor," the defendant nevertheless may avoid an award of damages or reinstatement by showing that it would have taken the same action "in the absence of the impermissible motivating factor." *See* 42 U.S.C. § 2000e-5(g)(2)(B). This instruction is designed to submit this "same decision" issue to the jury. *See Doane v. City of Omaha*, 115 F.3d 624, 629 (8th Cir. 1997) (discussing remedies available in "mixed motive" case under ADA); *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995) (same). *See also Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 396-97 (8th Cir. 1996) (discussing "prevailing party" for purposes of awarding attorneys' fees).

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

5.51C ADA - REASONABLE ACCOMMODATION CASES (Specific Accommodation Identified)

Your verdict must be for plaintiff and against defendant if all of the following elements have been proved by the [(greater weight) (preponderance)][1] of the evidence:

First, plaintiff had (specify alleged impairment(s));[2] and

Second, such (specify alleged impairment(s)) substantially limited plaintiff's ability to (specify major life activity or activities affected); and[3]

Third, defendant knew[4] of plaintiff's (specify alleged impairment(s)); and

Fourth, plaintiff could have performed the essential functions[5] of the (specify job held or position sought) at the time defendant (specify action(s) taken with respect to plaintiff) if plaintiff had been provided with (specify accommodation(s) identified by plaintiff)[6]; and

Fifth, providing (specify accommodation(s) identified by plaintiff) would have been reasonable; and

Sixth, defendant failed to provide (specify accommodation(s) identified by plaintiff) and failed to provide any other reasonable accommodation.[7]

If any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence [or if defendant is entitled to a verdict under (describe instruction)], [8] then your verdict must be for defendant.

Committee Comments

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). Although many individuals with disabilities are qualified to perform the essential functions of jobs without need of any accommodation, this instruction is designed for use in cases in which the nature or extent of accommodations provided to an otherwise qualified individual is in dispute. For a discussion of the "interactive process" in which employers and employees may be required to engage to determine the nature and extent of accommodations needed, see section 5.50.

The term "accommodation" means making modifications to the work place which allows a person with a disability to perform the essential functions of the job or allows a person with a disability to enjoy the same benefits and privileges as an employee without a disability. *See Kiel*,

169 F.3d at 1136 ("A reasonable accommodation should provide the disabled individual an equal employment opportunity, including an opportunity to attain the same level of performance, benefits, and privileges that is available to similarly situated employees who are not disabled.").

A "reasonable" accommodation is one that could reasonably be made under the circumstances and may include but is not limited to: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. 29 C.F.R. § 1630.2(o); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995).

Although part-time work and job restructuring may be considered reasonable accommodations, "[t]his does not mean an employer is required to offer those accommodations in every case." *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575 (8th Cir. 2000). Moreover, although job restructuring is a possible accommodation under the ADA, an employer need not reallocate the essential functions of a job. *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999); *Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084 (8th Cir. 2000); *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575 (8th Cir. 2000); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Benson*, 62 F.3d at 1112-13 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)). In addition, an employer is not obligated to hire additional employees or reassign existing workers to assist an employee. *Fjellestad*, 188 F.3d at 950 (citing *Moritz*, 124 F.3d at 788).

Reassignment to a vacant position is another possible accommodation under the ADA. *Benson*, 62 F.3d at 1114 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)); *see also Fjellestad*, 188 F.3d at 950-51 (plaintiff created genuine issue of material fact as to whether employer could have reassigned her to a specific, vacant position). In fact, the Eighth Circuit has recognized that, in certain circumstances, reassignment to a vacant position may be "necessary" as a reasonable accommodation. *See Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1018 (8th Cir. 2000). The scope of the reassignment duty is limited, however. *Id.* at 1019. For example, reassignment is an accommodation of "last resort"; that is, the "very prospect of reassignment does not even arise unless accommodation within the individual's current position would pose an undue hardship." *Id.* Moreover, the ADA does not require an employer to create a new position as an accommodation. *Id.*; *see also Treanor*, 200 F.3d at 575 ("[T]he ADA does not require an employer to create a new part-time position where none previously existed."); *Fjellestad*, 188 F.3d at 950 (employer not required to create new position or to create permanent position out of a temporary one). In addition, an employer is not required to "bump" another employee in order to reassign a disabled employee to that position. *Cravens*, 214 F.3d at 1019. Promotion is not required. *Id.* Finally, the employee must be "otherwise qualified" for the reassignment position. *Id.*

An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

The ADA does not require the preferential treatment of individuals with disabilities in terms of job qualifications as a reasonable accommodation. *See Harris v. Polk County*, 103 F.2d 696, 697 (8th Cir. 1996) (employer lawfully denied job to disabled applicant on basis of criminal record which allegedly had resulted from prior psychological problems because "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees").

In some cases, the timing of the plaintiff's alleged disability is critical. If necessary, the language may be modified to incorporate the relevant time frame of the plaintiff's alleged disability.

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

2. The name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

3. This element is designed to submit the issue of whether the plaintiff's alleged impairment constitutes a "disability" under the ADA. If necessary, the phrase "substantially limits" may be defined. *See infra* Model Instruction 5.52(C).

4. This language may need to be modified if there is a dispute whether the defendant had adequate knowledge of the plaintiff's impairment. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that an employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of her disabling

condition even though the employer had some awareness of the plaintiff's health problems). *See also Miller v. National Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 934 (7th Cir. 1995))). For more discussion on this issue, see section 5.50.

5. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52(B).

6. It may be that in the majority of cases, the plaintiff requests the provision of a specific accommodation (*e.g.*, a modified work schedule). In some cases, however, the plaintiff may simply notify the employer of his or her need for an accommodation in general. In such cases, the language of the instruction should be modified.

7. An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

8. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(c)(1)); infectious or communicable disease (42 U.S.C. § 12113(d)(2)); illegal use of drugs (42 U.S.C. § 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

Employment Cases -- Element and Damage Instructions

5.52A DISABILITY

[no definition recommended]

Committee Comments

As drafted, the Model Instructions do not use the term "disability" and, thus, do not require the jury to determine whether a plaintiff has a "disability." Rather, the instructions require the jury to find the facts which support the underlying elements of a disability under the Act.

5.52B ESSENTIAL FUNCTIONS

In determining whether a job function is essential, you should consider the following factors: [(1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of persons who have held the job; (7) the current work experience of persons in similar jobs; (8) whether the reason the position exists is to perform the function; (9) whether there are a limited number of employees available among whom the performance of the function can be distributed; (10) whether the function is highly specialized and the individual in the position was hired for his or her expertise or ability to perform the function; and (11) (list any other relevant factors supported by the evidence)].[1]

No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

The term "essential functions" means the fundamental job duties of the employment position the plaintiff holds or for which the plaintiff has applied. The term "essential functions" does not include the marginal functions of the position.

Committee Comments

The ADA protects only those individuals who, with or without reasonable accommodation, can perform the essential functions of the employment position that the plaintiff holds or desires. *See* 42 U.S.C. § 12111(8); *Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084 (8th Cir. 2000); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 786-87 (8th Cir. 1998); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995). Thus, this instruction is designed for use in connection with the essential elements instruction in cases where the issue of whether a particular job requirement or task is an "essential function" of the job is in dispute. The instruction, although not technically a definition, should be used to instruct the jury in determining whether a given job duty is essential.

The instruction is based on 29 C.F.R. § 1630.2(n) and the Eighth Circuit's opinions in *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998) (“An employer's identification of a position's “essential functions” is given some deference under the ADA.”); *Moritz*, 147 F.3d at 787; and *Benson*, 62 F.3d at 1113.

Employment Cases -- Element and Damage Instructions

Notes on Use

1. This instruction should be modified, as appropriate, to include only those factors supported by the evidence.

5.52C SUBSTANTIALLY LIMITS

The phrase "substantially limits" as used in these instructions means an individual is [unable to perform (specify major life activity affected)] [significantly restricted in the ability to perform (specify major life activity affected)].[1]

In determining whether the plaintiff's impairment substantially limits plaintiff's ability to (specify major life activity affected), you should compare the plaintiff's ability to (specify major life activity affected) with that of the average person. In doing so, you should also consider: (1) the nature and severity of the impairment; (2) how long the impairment will last or is expected to last; and (3) the permanent or long-term impact, or expected impact, of the impairment. [Temporary impairments with little or no long-term impact are not sufficient.][2]

It is not the name of an impairment or a condition that matters, but rather the effect of an impairment or condition on the life of a particular person.

Committee Comments

This instruction is designed for use in connection with the essential elements instruction in cases in which the issue of whether plaintiff has a disability under the ADA is in dispute. The language of the instruction is based on 29 C.F.R. § 1630.2(j). The term "substantially limits" may be of such common usage that a definition is not required. If the Court desires to define the term, however, the Committee recommends this definition. The instruction will need to be modified in cases where the plaintiff claims that the defendant "regarded" plaintiff as having a substantially limiting impairment.

An impairment is only a disability under the ADA if it substantially limits one or more major life activities. *See* 42 U.S.C. § 12102(2). The phrase "substantially limits" means that an individual is (i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity. 29 C.F.R. § 1630.2(j)(1); *Fjellestad v. Pizza Hut of Am, Inc.*, 188 F.3d 944, 948-49 (8th Cir. 1999); *Snow v. Ridgeway Med. Ctr.*, 128 F.3d 1201, 1206 (8th Cir. 1997); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997).

The United States Supreme Court has held that a physical or mental impairment that is corrected by medication, the body's own systems, or other measures does not "substantially limit" a major life activity. *See Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *accord Spades v. City of Walnut Ridge*, 186 F.3d 897, 899-900 (8th Cir. 1999) (alleged disability of

depression did not substantially limit any of plaintiff's major life activities where plaintiff conceded that resort to medicines and counseling allowed him to function without limitation).

The following factors are relevant in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2); *Fjellestad*, 188 F.3d at 949; *Snow*, 128 F.3d at 1207; *Helfter*, 115 F.3d at 616; *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996). Temporary, non-chronic impairments of short duration with little or no long-term or permanent impact are usually not disabilities. *See Gutridge v. Clure*, 153 F.3d 898, 901-02 (8th Cir. 1998) (citing 29 C.F.R. § 1630 App., § 1630.2(j); *Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir. 1997)).

If the plaintiff alleges that he or she is substantially limited in the major life activity of working, a separate instruction may need to be given. Generally, the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *Snow*, 128 F.3d at 1206 (citing 29 C.F.R. § 1630.2(j)(3)(i)); *Aucutt*, 85 F.3d at 1319 (same); *accord Fjellestad*, 188 F.3d at 949 ("Finding that an individual is substantially limited in his or her ability to work requires a showing that his or her overall employment opportunities are limited."). Rather, a person must show the impairment significantly restricts his or her ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. *Snow*, 128 F.3d at 1206-07 (citing 29 C.F.R. § 1630.2(j)(3)(i)); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996) (same); *accord Shipley v. City of University City*, 195 F.3d 1020, 1022-23 (8th Cir. 1999) (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, ___, 119 S. Ct. 2139, 2150-52 (1999)); *Fjellestad*, 188 F.3d at 949.

The following factors are relevant in determining whether a person is substantially limited in the major life activity of working: (1) the number and type of jobs from which the individual has been disqualified because of the impairment; (2) the geographical area to which the individual has reasonable access; and (3) the individual's job training, experience and expectations. 29 C.F.R. § 1630.2(j)(3); *Fjellestad*, 188 F.3d at 949; *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 617 (8th Cir. 1997); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996).

Ultimately, "a court must ask 'whether the particular impairment constitutes for the particular person a significant barrier to employment.'" *Webb*, 94 F.3d at 488 (quoting *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986)). The courts caution, however, that "'working' does not mean working at a particular job of that person's choice." *Smith v. City of Des Moines*, 99 F.3d 1466, 1474 (8th Cir. 1996) (quoting *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995)).

Employment Cases -- Element and Damage Instructions

Notes on Use

1. Select the bracketed language that is supported by the evidence.

2. Use the bracketed language only if it is supported by the evidence.

5.53A "UNDUE HARDSHIP" -- STATUTORY DEFENSE

Your verdict must be in favor of the defendant if it has been proved by the [(greater weight) (preponderance)][1] of the evidence that providing (specify accommodation) would cause an undue hardship on the operation of defendant's business.

The term "undue hardship," as used in these instructions, means an action requiring defendant to incur significant difficulty or expense when considered in light of the following:

[(1) the nature and cost of (specify accommodation);

(2) the overall financial resources of the facility involved in the provision of (specify accommodation), the number of persons employed at such facility and the effect on expenses and resources;

(3) the overall financial resources of the defendant;

(4) the overall size of the business of defendant with respect to the number of its employees and the number, type and location of its facilities;

(5) the type of operation of the defendant, including the composition, structure, and functions of the workforce;

(6) the impact of (specify accommodation) on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business;

and (list any other relevant factors supported by the evidence)].[2]

Committee Comments

Under the ADA, an employer must provide a reasonable accommodation to the known physical limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would impose an undue hardship on the business. *See* 42 U.S.C. § 12111(9) and Model Instruction 5.51(B), *infra*, Committee Comments. Thus, this instruction should be used to submit the defense of undue hardship. *See* 42 U.S.C. § 12111(10).

Eighth Circuit case law holds that the defendant in any civil case is entitled to a specific instruction on its theory of the case, if the instruction is "legally correct, supported by the evidence and brought to the court's attention in a timely request." *Des Moines Bd. of Water Works v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983).

Employment Cases -- Element and Damage Instructions

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

2. This instruction should be modified, as appropriate, to include only those factors supported by the evidence.

5.53B "DIRECT THREAT" -- STATUTORY DEFENSE

Your verdict must be in favor of the defendant if it has been proved by the [(greater weight) (preponderance)][1] of the evidence that

First, defendant (specify action(s) taken with respect to plaintiff) because plaintiff posed a direct threat to the health or safety of others in the workplace; and

Second, such direct threat could not be eliminated by reasonable accommodation.

A direct threat means a significant risk of substantial harm to the health or safety of the person or other persons that cannot be eliminated by reasonable accommodation. The determination that a direct threat exists must be based on a specific personal assessment of the plaintiff's present ability to safely perform the essential functions of the job. This assessment of the plaintiff's ability must be based on either a reasonable medical judgment that relies on the most current medical knowledge, or on the best available objective evidence.

In determining whether a person poses a direct threat, you must consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the likely time before the potential harm occurs.

Committee Comments

This instruction should be used in submitting the defense of direct threat. *See* 42 U.S.C. § 12111(3); 29 C.F.R. 1630.2(r). Eighth Circuit case law holds that the defendant in any civil case is entitled to a specific instruction on its theory of the case, if the instruction is "legally correct, supported by the evidence and brought to the court's attention in a timely request." *Des Moines Bd. of Water Works v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983).

Under the ADA, an employer may apply its qualification standards, tests, or selection criteria to screen out, deny a job to, or deny a benefit of employment to a disabled person, if such criteria are job-related and consistent with business necessity and if the person cannot perform the essential function of the position with reasonable accommodation. 42 U.S.C. § 12113(a); *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1283-84 (7th Cir. 1995).

The ADA includes within the term “qualification standards” the requirement that the employee not pose a direct threat to the health or safety of other individuals in the workplace. *See* 42 U.S.C. § 12133(b). At least one court has rejected the language of 29 C.F.R. § 1630.2(r) which expands the ADA to include the employee being a direct threat to himself or herself. *See Kohnke*

v. Delta Airlines, Inc., 932 F. Supp. 1110, 1111-12 (N.D. Ill. 1996). That court, however, held that a qualification standard which proscribed an employee being a direct threat to himself, as well as others in the workplace, could pass muster under the more general provision of 42 U.S.C. § 12113(a).

For a discussion of the "direct threat" defense in the health care context, *see Bragdon v. Abbott*, 524 U.S. 624, ___, 118 S. Ct. 2196, 2210 (1998) (health care professional has duty to assess risk based on objective, scientific information available to him or her and others in profession).

Notes on Use

1. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

2. The term "direct threat" is defined by the ADA as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *See* 42 U.S.C. § 12113 (b). The applicable regulations define "direct threat" as a "significant risk of substantial harm to the health or safety *of the individual* or others that cannot be eliminated *or reduced* by reasonable accommodation." *See* 29 C.F.R. § 1630.2(r) (emphasis added). This regulatory expansion of the ADA to include an employee being a threat to himself or herself, as well as to others, has been rejected by at least one court. *See Kohnke v. Delta Airlines, Inc.*, 932 F. Supp. 1110 (N.D. Ill. 1996).

5.54 ACTUAL DAMAGES

If you find in favor of plaintiff under Instruction ___[1] [and if you answer "no" in response to Instruction ___,][2] then you must award plaintiff such sum as you find by the [(greater weight) (preponderance)][3] of the evidence will fairly and justly compensate plaintiff for any damages you find plaintiff sustained as a direct result of [describe defendant's decision--e.g., "defendant's failure to hire plaintiff"]. Plaintiff's claim for damages includes three distinct types of damages and you must consider them separately.

First, you must determine the amount of any wages and fringe benefits[4] plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge] through the date of your verdict,[5] *minus* the amount of earnings and benefits that plaintiff received from other employment during that time.

Second, you must determine the amount of any other damages sustained by plaintiff, such as [list damages supported by the evidence].[6] You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.[7]

[You are also instructed that plaintiff has a duty under the law to "mitigate" [his/her] damages--that is, to exercise reasonable diligence under the circumstances to minimize [his/her] damages. Therefore, if you find by the [(greater weight) (preponderance)] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [him/her], you must reduce [his/her] damages by the amount [he/she] reasonably could have avoided if [he/she] had sought out or taken advantage of such an opportunity.][8]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][9]

Committee Comments

The Civil Rights Act of 1991 makes three significant changes in the law regarding the recovery of damages in Title VII cases. First, the plaintiff prevails on the issue of liability by showing that unlawful discrimination was a "motivating factor" in the relevant employment decision; however, the plaintiff cannot recover any actual damages if the employer shows that it would have

made the same employment decision even in the absence of any discriminatory intent. 42 U.S.C. § 2000e-2(g)(2)(B). Second, the Civil Rights Act permits the plaintiff to recover general compensatory damages in addition to the traditional employment discrimination remedy of back pay and lost benefits. *Id.* § 1981a(a). Third, the Act expressly limits the recovery of general compensatory damages to certain dollar amounts, ranging from $50,000 to $300,000 depending upon the size of the employer. *Id.* § 1981a(b).

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982). This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Industries*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same). *But see Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same). However, because Title VII, as amended by the Civil Rights Act of 1991, no longer limits recovery of damages, the instruction permits the recovery of general damages for pain, suffering, humiliation, and the like.

Because the law imposes a limit on general compensatory damages but does not limit the recovery of back pay and lost benefits, the Committee believes that these types of damages must be considered and assessed separately by the jury. Otherwise, if the jury awarded a single dollar amount, it would be impossible to identify the portion of the award that was attributable to back pay and the portion that was attributable to "general damages." As a result, the trial court would not be able to determine whether the jury's award exceeded the statutory limit.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

In *Kramer v. Logan County School Dist. No. R-1*, 157 F.3d 620, 625-26 (8th Cir. 1998), the court ruled that "front pay is an equitable remedy excluded from the statutory limit on compensatory damages provided for in [42 U.S.C.] § 1981a(b)(3)."

Although the Civil Rights Act of 1991 expressly limits the amount of compensatory and punitive damages depending upon the size of the employer, the jury shall not be advised on any such limitation. 42 U.S.C. § 1981a(c)(2). Instead, the trial court will simply reduce the verdict by the amount of any excess.

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here. Even if the jury finds that the defendant would have made the same decision regardless of plaintiff's disability, the Court may direct the jury to determine the amount of damages, if any, sustained by the plaintiff. This approach will protect against the necessity of a retrial of the case in the event the underlying liability determination is reversed on appeal.

3. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

4. When certain benefits, such as employer-subsidized health insurance, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchased substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161-62 (7th Cir. 1981); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

5. Front pay is an equitable issue for the judge to decide. *Excell Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999) (Title VII case). In some cases, the defendant will assert some independent post-discharge reason--such as a plant closing or sweeping reduction in force--as to why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). In those cases, this instruction must be modified to submit this issue for the jury's determination.

6. Under the Civil Rights Act of 1991, a prevailing ADA plaintiff may recover damages for mental anguish and other personal injuries. The types of damages mentioned in § 1981a(b)(3) include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." For cases involving the provision of a reasonable accommodation (Model Instruction 5.51(C), *infra*), the plaintiff may not recover such damages if the defendant demonstrated "good faith efforts" to arrive at a reasonable accommodation with the plaintiff. *See infra* Model Instruction 5.57.

7. If the issue of "front pay" is submitted to the jury, it should be distinguished from an award of compensatory damages, which is subject to the statutory cap. *See infra* Committee Comments. Accordingly, separate categories of damages must be identified.

8. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Fieldler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982).

9. This paragraph may be given at the trial court's discretion.

5.55 NOMINAL DAMAGES

If you find in favor of plaintiff under Instruction ___[1] [and if you answer "no" in response to Instruction ___,][2] but you find that plaintiff's damages have no monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).[3]

Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some case, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here. Even if the jury finds that the defendant would have made the same decision regardless of plaintiff's disability, the Court may direct the jury to determine the amount of damages, if any, awarded to the plaintiff. This approach will protect against the necessity of a retrial of the case in the event the underlying liability determination is reversed on appeal.

3. One dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value of the harm that the plaintiff suffered from the violation of his rights. *Dean v. Civiletti*, 670 F.2d 99, 101 (8th Cir. 1982) (Title VII); *cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value of the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

5.56 PUNITIVE DAMAGES

In addition to actual [and nominal] damages mentioned in the other instructions, the law permits the jury under limited circumstances to award an injured person punitive damages.

If you find in favor of plaintiff under Instruction _____,[1] and if you answer "no" in response to Instruction _____,[2] then you must decide whether defendant acted with malice or reckless indifference to plaintiff's right not to be discriminated against[3] on the basis of [his/her] (specify alleged impairment(s)). Defendant acted with malice or reckless indifference if:

> it has been proved by the [(preponderance) or (greater weight)] of the evidence that [insert the name(s) of the defendant or manager[4] who terminated[5] plaintiff's employment] knew that the (termination)[5] was in violation of the law prohibiting disability discrimination, or acted with reckless disregard of that law.

[However, you may not award punitive damages if it has been proved by the [(preponderance) or (greater weight)] of the evidence [that defendant made a good-faith effort to comply with the law prohibiting disability discrimination][6].

If you find that defendant acted with malice or reckless disregard and did not make a good faith effort to comply with the law, then, in addition to any actual [or nominal] damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or to deter defendant and others from like conduct in the future. Whether to award plaintiff punitive damages, and the amount of those damages, are within your discretion.

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.][7]

Committee Comments

Under the Civil Rights Act of 1991, a Title VII or ADA plaintiff may recover damages by showing that the defendant engaged in discrimination "with malice or with reckless indifference to [his or her] federally protected rights." *See* 42 U.S.C. § 1981a(b)(1). *See also* Model Instruction 4.53, *infra*, on punitive damages and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In

1999, the United States Supreme Court explained that the terms "malice" and "reckless" ultimately focus on the actor's state of mind. *Kolstad v. American Dental Association*, 527 U.S. 526, 535 (1999). The Court added that the terms pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *Id.* To be liable for punitive damages, the employer must at least discriminate in the face of a perceived risk that its actions will violate federal law. *Id.* at 536. Rejecting the conclusion of the lower court that punitive damages were limited to cases involving intentional discrimination of an "egregious" nature, the Court held that a plaintiff is not required to show egregious or outrageous discrimination independent of the employer's state of mind. *Id.* at 546.

The *Kolstad* case also established a good-faith defense to place limits on an employer's vicarious liability for punitive damages. Recognizing that Title VII and the ADA are both efforts to promote prevention of discrimination as well as remediation, the Court held that an employer may not be vicariously liable for the discriminatory decisions of managerial agents where those decisions are contrary to the employer's good faith efforts to comply with Title VII or the ADA. *Id.* at 545. The Court does not clarify which party has the burden of proof on the issue of good faith.

For cases involving the provision of a reasonable accommodation (*see infra* Model Instruction 5.51(C)),the plaintiff may not recover punitive damages if the defendant demonstrated "good faith efforts" to arrive at a reasonable accommodation with the plaintiff. *See infra* Model Instruction 5.57.

Under the ADA, as amended by the Civil Rights Act of 1991, the upper limit on an award including punitive and compensatory damages is $300,000. *See* 42 U.S.C. § 1981a(b)(3) (limiting the sum of compensatory and punitive damages awards depending on the size of the employer). For a discussion of submitting punitive damages to the jury under both state and federal law, see *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575-78 (8th Cir. 1997).

Notes on Use

1. Fill in the number or title of the essential elements instruction here. *See infra* Model Instructions 5.51(A), 5.51(B) and 5.51(C).

2. Fill in the number or title of the "same decision" instruction if applicable. *See infra* Model Instruction 5.51(A/B)(1).

3. Although a finding of discrimination ordinarily subsumes a finding of intentional misconduct, this language is included to emphasize the threshold for recovery of punitive damages. Under the Civil Rights Act of 1991, the standard for punitive damages is whether the defendant acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights." Civil Rights Act of 1991, § 102 (codified at 42 U.S.C. § 1981a(b)(1)).

4. Use the name of the defendant, the manager who took the action, or other descriptive phrase such as "the manager who fired plaintiff."

5. This language is designed for use in a discharge case. In a "failure to hire," "failure to promote," "demotion," or "constructive discharge" case, the language must be modified.

6. Use this phrase only if the good faith of defendant is to be presented to the jury. This two-part test was articulated by the United States Supreme Court in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). For a discussion of the case, see the Committee Comments. It is not clear from the case who bears the risk of nonpersuasion on the good faith issue. The Committee predicts that case law will place the burden on the defendant to raise the issue and prove it.

7. The bracketed language is available for use if punitive damage claims are submitted against more than one defendant.

5.57 "GOOD FAITH" DEFENSE TO COMPENSATORY AND PUNITIVE DAMAGES

If you find in favor of plaintiff under Instruction ___,[1] then you must answer the following question in the verdict form(s): Has it been proved by the [(greater weight) (preponderance)][2] of the evidence that the defendant made a good faith effort and consulted with the plaintiff, to identify and make a reasonable accommodation?

Committee Comments

This instruction is designed for use in cases where a discriminatory practice involves the provision of a reasonable accommodation. The language is derived from 42 U.S.C. § 1981a(a)(3), which provides that the plaintiff may not recover damages if the defendant "demonstrates good faith efforts" to arrive at a reasonable accommodation with the plaintiff.

If the jury answers the above interrogatory in the affirmative, the plaintiff may still be entitled to attorneys' fees and nominal damages.

Notes on Use

1. Fill in the number or title of the "reasonable accommodation" essential elements instruction here (Model Instruction 5.51(C), *infra*).

2. Select the bracketed language that corresponds to the burden-of-proof instruction given. *See also* Model Instruction 3.04, *infra*, and the Committee Comments thereto.

5.58 BUSINESS JUDGMENT INSTRUCTION

You may not return a verdict for plaintiff just because you might disagree with defendant's (decision)[1] or believe it to be harsh or unreasonable.

Committee Comments

In *Walker v. AT&T Technologies*, 995 F.2d 846 (8th Cir. 1993), the Eighth Circuit ruled that it is reversible error to deny a defendant's request for an instruction which explains that an employer has the right to make subjective personnel decisions for any reason that is not discriminatory. Moreover, the Circuit has expressly approved the language of the instruction set forth here. *See Wolff v. Brown*, 128 F.3d 682, 685 (8th Cir. 1997) ("In an employment discrimination case, a business judgment instruction is 'crucial to a fair presentation of the case,' and the district court must offer it whenever it is proffered by the defendant."). *Cf. Blake v. J.C. Penney Co.*, 894 F.2d 274, 281 (8th Cir. 1990) (upholding a different business judgment instruction as sufficient).

Notes on Use

1. This instruction makes reference to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--is more appropriate.

5.59 CONSTRUCTIVE DISCHARGE INSTRUCTION

See infra Model Instruction No. 5.93.

5.60 *et seq.* (Reserved for "Reasonable Accommodation" Cases under the Americans with Disabilities Act, 42 U.S.C. § 12101)

5.70 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION
Introductory Comment

The legal theory underlying First Amendment retaliation cases is that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983); *see also Pickering v. Board of Educ.*, 391 U.S. 563, 568-74 (1968); *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987); *Waters v. Churchill*, 511 U.S. 661 (1994). Although most First Amendment retaliation cases relate to the termination of the plaintiff's employment, they can involve demotions, suspensions, and other employment-related actions. *See, e.g., Stever v. Independent School Dist. No. 625*, 943 F.2d 845 (8th Cir. 1991) (transfer); *Powell v. Basham*, 921 F.2d 165, 167-68 (8th Cir. 1990) (denial of promotion); *Duckworth v. Ford*, 995 F.2d 858, 860-61 (8th Cir. 1993) (harassment). Generally, there are three issues in First Amendment retaliation cases: whether the plaintiff's speech was "protected activity" under the First Amendment; whether the plaintiff's speech was a motivating or substantial factor in the defendant's decision to terminate or otherwise impair the plaintiff's employment; and whether the defendant would have taken the same action irrespective of the plaintiff's speech. *E.g., Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 313 (8th Cir. 1986). In view of the Supreme Court's decision in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), the model instruction on liability utilizes a motivating-factor/same-decision burden-shifting format in all First Amendment retaliation cases.

5.71 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - ESSENTIAL ELEMENTS

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's First Amendment retaliation claim][2] if the following elements have been proved by the [(greater weight) (preponderance)][3] of the evidence:

First, defendant [discharged][4] plaintiff; and

Second, plaintiff's [here specifically describe plaintiff's protected speech - *e.g.*, letter to the local newspaper][5] was a motivating factor[6] in defendant's decision [to discharge][7] plaintiff[; and

Third, defendant was acting under color of law].[8]

However, your verdict must be for defendant if any of the above elements has not been proved by the [(greater weight) (preponderance)] of the evidence, or if it has been proved by the [(greater weight) (preponderance)] of the evidence that defendant would have [discharged] plaintiff regardless of [his/her] (letter to the local newspaper).[9]

Committee Comments

OVERVIEW

Public employers may not retaliate against their employees for speaking out on matters of public concern unless their speech contains knowingly or recklessly false statements, undermines the ability of the employee to function, or interferes with the operation of the governmental entity. *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983). In recent years, the Eighth Circuit has issued a number of noteworthy decisions concerning this theory of liability. *See Duckworth v. Ford*, 995 F.2d 858, 861 (8th Cir. 1993) (holding that defendants were not entitled to qualified immunity in First Amendment case); *Shands v. City of Kennett*, 993 F.2d 1337, 1344-46 (8th Cir. 1993) (affirming j.n.o.v. for employer where plaintiff's comments regarding personnel and safety issues were not protected by First Amendment); *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197 (8th Cir. 1993) (affirming summary judgment for employer where plaintiff's comments regarding school district policy were not "protected activity"); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992) (individual defendant was not entitled to qualified immunity defense in First Amendment case); *Bartlett v. Fischer*, 972 F.2d 911 (8th Cir. 1992) (approving qualified immunity defense in First Amendment case); *Stever v. Independent School Dist. No. 625*, 943 F.2d 845 (8th Cir. 1991) (analyzing "protected speech" and "causation" issues); *Powell v. Basham*, 921 F.2d 165 (8th Cir. 1990) (holding that public employee's criticism of employer's promotion process was "protected activity"); *Crain v. Board of Police Comm'rs*, 920 F.2d 1402 (8th Cir. 1990) (affirming summary judgment where plaintiffs' internal grievances did not rise to the level of "protected

speech"); *Hoffmann v. City of Liberty*, 905 F.2d 229 (8th Cir. 1990) (employee grievance was not protected by the First Amendment); *Darnell v. Ford*, 903 F.2d 556 (8th Cir. 1990) (ruling that state police officer's support of a certain candidate for the position of Highway Patrol Superintendent was "protected activity").

PRIMARY ISSUES IN FIRST AMENDMENT CASES

Generally, there are three primary issues in First Amendment retaliation cases: (1) whether the plaintiff's speech was "protected activity" under the First Amendment; (2) whether the plaintiff's protected activity was a substantial or motivating factor in defendant's decision to terminate or otherwise impair the plaintiff's employment; and (3) whether the defendant would have taken the same action irrespective of plaintiff's protected activity. *Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 313 (8th Cir. 1986); *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). The determination of whether the plaintiff's speech was "protected" presents a question of law for the court. *E.g., Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197, 1198 (8th Cir. 1993); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 313 (8th Cir. 1986).

SECONDARY ISSUES RELATING TO "PROTECTED SPEECH" DETERMINATION

In general, the question of whether the plaintiff's speech was "protected" depends upon two subissues: (1) whether the plaintiff's speech addressed a matter of "public concern"; and (2) whether, in balancing the competing interests, the plaintiff's interest in commenting on matters of public concern outweighs the government's interest in rendering efficient services to its constituents. *Waters v. Churchill*, 511 U.S. 661 (1994); *Hamer v. Brown*, 831 F.2d 1398, 1401-02 (8th Cir. 1987); *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). In many cases, the trial court will be able to determine whether the plaintiff's speech was protected without much difficulty. However, as discussed below, complicated issues can arise when there are factual disputes underlying this issue. *See Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993).

a. *Public Concern*

Analysis of whether the plaintiff's speech addressed a matter of "public concern" requires consideration of the plaintiff's role in conveying the speech, whether the plaintiff attempted to communicate to the public at large, and whether the plaintiff was attempting to generate public debate or merely pursuing personal gain. *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197 (8th Cir. 1993); *but cf. Derrickson v. Board of Educ.*, 703 F.2d 309, 316 (8th Cir. 1983) (speech can be protected even if it was "privately express[ed]" to plaintiff's superiors); *Darnell v. Ford*, 903 F.2d 556, 563 (8th Cir. 1990) (speech was protected even if it was motivated by plaintiff's self-interest); *see generally Connick v. Myers*, 461 U.S. 138, 147 (1983) (speech is not protected by First Amendment if plaintiff speaks merely as an employee upon matters only of personal interest). Determination of whether the plaintiff's speech addressed a matter of public concern appears to fall

exclusively within the province of the court. *See Lewis v. Harrison School Dist.*, 805 F.2d 310, 312-13 (8th Cir. 1986) (trial court erred in following jury's finding that plaintiff's speech did not address a matter of public concern).

b. *Balancing of Interests*

Analysis of the "balancing" issue depends upon a variety of factors, which traditionally have included the following: the need for harmony in the workplace; whether the governmental entity's mission required a close working relationship between the plaintiff and his or her co-workers when the speech in question has caused or could have caused deterioration in the plaintiff's work relationships; the time, place, and manner of the speech; the context in which the dispute arose; the degree of public interest in the speech; and whether the speech impaired the plaintiff's ability to perform his or her duties. *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993); *Hamer v. Brown*, 831 F.2d 1398, 1402 (8th Cir. 1987); *see generally Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). This balancing process is flexible, and the weight to be given to any one factor depends upon the specific circumstances of each case. *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993).

c. *Balancing and Jury Instructions*

Although the balancing process ultimately is a function for the court, Eighth Circuit case law indicates that subsidiary factual issues must be submitted to the jury. For example, in *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983), the court stated that "[i]t was for the jury to decide whether the [plaintiff's] letter [to the editor] created disharmony between McGee and his immediate supervisors." Likewise, in *Lewis v. Harrison School Dist.*, 805 F.2d 310, 315 (8th Cir. 1986), the Eighth Circuit ruled that it was error for the trial court to disregard the jury's special interrogatory findings on certain balancing issues. In *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993), the court stated that:

> Any underlying factual disputes concerning whether the plaintiff's speech is protected . . . should be submitted to the jury through special interrogatories or special verdict forms. For example, the jury should decide factual questions such as the nature and substance of the plaintiff's speech activity, and whether the speech created disharmony in the work place. The trial court should then combine the jury's factual findings with its legal conclusions in determining whether the plaintiff's speech is protected.

Id. at 1342-43 (citations omitted). Accordingly, this model instruction may be supplemented with a set of special interrogatories or it may require modification to elicit specific jury findings on critical balancing issues such as "disharmony." *See infra* Note on Use 2; Model Instruction 5.71A. Although the plaintiff appears to have the burden of proof as to whether the speech was "constitutionally protected," *see Cox v. Miller County R-1 School Dist.*, 951 F.2d 927, 931 (8th Cir. 1991) and

Stever v. Independent School Dist. No. 625, 943 F.2d 845, 849-50 (8th Cir. 1991), it is unclear whether the plaintiff bears the burden of proof as to each subsidiary factor.

When the trial court submits special interrogatories to the jury, it bears emphasis that the ultimate decision as to whether the plaintiff's speech was protected is a question of law for the court. *E.g., Lewis v. Harrison School Dist.*, 805 F.2d 310, 312-13 (8th Cir. 1986) (trial court erred in following jury's finding that speech did not address matter of public concern); *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 644-45 (8th Cir. 1983) (plaintiff's speech was protected even though it "contributed to the turmoil" at the workplace). It also bears emphasis that the defendant's reasonable perception of the critical events is controlling; the jury cannot be allowed to substitute its judgment as to what "really happened" for the honest and reasonable belief of the defendant. *Waters v. Churchill*, 511 U.S. 661 (1994.)

d. *Balancing and Qualified Immunity*

The need to address the balancing issue in jury instructions is most likely to arise in cases brought against municipalities, school districts, and other local governmental bodies which are not entitled to qualified immunity or Eleventh Amendment immunity. In contrast, recent Eighth Circuit case law suggests that *individual defendants* may have qualified immunity with respect to any jury-triable damages claims if the "balancing issue" becomes critical in a First Amendment case. *See Grantham v. Trickey*, 21 F.3d 289, 295 (8th Cir. 1994) (holding that individual defendants are entitled to qualified immunity where there is specific and unrefuted evidence that the employee's speech affected morale and substantially disrupted the work environment); *Bartlett v. Fisher*, 972 F.2d 911, 916 (8th Cir. 1992) (suggesting that qualified immunity from damages will apply whenever a First Amendment retaliation case involves the "balancing test"). *But cf. Duckworth v. Ford*, 995 F.2d 858, 861 (8th Cir. 1993) (rejecting individual defendants' qualified immunity defense in First Amendment case); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992) (rejecting qualified immunity in First Amendment case where defendant failed to introduce evidence sufficient to invoke the balance test); *Powell v. Basham*, 921 F.2d 165, 167-68 (8th Cir. 1990) (rejecting qualified immunity defense in First Amendment wrongful discharge cases); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 318 (8th Cir. 1986) (same). In *Waters v. Churchill*, 511 U.S. 661 (1994), the Supreme Court declined to address the issue of qualified immunity in First Amendment cases. In addition, state governmental bodies typically have Eleventh Amendment immunity from damages claims. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). Accordingly, when balancing issues arise in a case brought by a state employee, the defendants may have immunity from a claim for damages and, as a result, there would be no need for a jury trial or jury instructions.

MOTIVATION AND CAUSATION

If a plaintiff can make the required threshold showing that he or she engaged in protected activity, the remaining issues focus on the questions of motivation and causation: was the plaintiff's employment terminated or otherwise impaired because of his or her protected activity? In *Mt.*

Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977), the Supreme Court introduced the "motivating-factor"/"same-decision" burden shifting format in First Amendment retaliation cases. On the issue of causation, it also should be noted that the Eighth Circuit has allowed a claim against a defendant who recommended the plaintiff's dismissal but lacked final decision-making authority. *Darnell v. Ford*, 903 F.2d 556, 561-62 (8th Cir. 1990). The Eighth Circuit also has allowed a claim against a school board for unknowingly carrying out a school principal's retaliatory recommendation. *Cox v. Dardanelle Pub. School Dist.*, 790 F.2d 668, 676 (8th Cir. 1986). More recently, in *Waters v. Churchill*, 511 U.S. 661 (1994), the Supreme Court ruled that a public employer does not violate the First Amendment if it honestly and reasonably believes reports by coworkers of unprotected conduct by the plaintiff; the Supreme Court did not address the situation where the public employer relied upon the tainted recommendation of a management-level employee.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

4. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

5. To avoid difficult questions regarding causation, it is very important to specifically describe the speech which forms the basis for the claim. Vague references to "the plaintiff's speech" or "the plaintiff's statements to the school board" often will be inadequate; instead, specific reference to the time, place and substance of the speech (*e.g.*, "plaintiff's comments criticizing teacher salaries at the April 1992 school board meeting") is recommended. Whenever there is a genuine issue as to whether the plaintiff's speech was "protected" by the First Amendment, the trial court should be extremely careful in making the record regarding this issue. If the trial court can readily determine that the plaintiff's speech was "protected" by the First Amendment without resort to jury findings, a succinct description of the protected speech should be inserted in the elements instruction. By way of example, the model instruction makes reference to plaintiff's "letter to the local newspaper." However, if there is an underlying factual dispute impacting whether the plaintiff's speech was protected, any questions of fact should be submitted to the jury through special interrogatories or other special instructional devices. *See Shands v. City of Kennett*, 993 F.2d 1337, 1342-43 (8th Cir. 1993).

As suggested by *Shands v. City of Kennett*, 993 F.2d 1337, 1342-43 (8th Cir. 1993), the trial court may separately submit special interrogatories to elicit jury findings as to the relevant balancing factors, while reserving judgment on the legal impact of those findings. For a sample set of interrogatories, *see infra* Model Instruction 5.71A. If the trial court takes this approach, it should postpone its entry of judgment while it fully evaluates the implications of the jury's findings of fact. *See infra* Model Instruction 5.75A. Alternatively, if the essential jury issue can be crystallized in the form of a single essential element which the plaintiff must prove, it may be included in the elements instruction. For example, in *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983), the trial court instructed the jury that its verdict had to be for the defendants if it believed that the plaintiff's "exercise of free speech had a disruptive impact upon the [school district's] employees."

6. The Committee believes that the term "motivating factor" may be of such common usage that it need not be defined. If the jury has a question regarding this term, the following may be a suitable definition: "The term 'motivating factor' means a consideration that moved the defendant toward its decision." The phrase "a factor that played a part" also may be an appropriate substitute for the phrase "motivating factor." *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101-02 (8th Cir. 1988). *But cf. Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977) (equating "motivating factor" with "substantial factor").

7. The bracketed term should be consistent with the first element. Accordingly, this instruction must be modified in a "failure-to-hire," "failure-to-promote," or "demotion" case.

8. Use this language if the issue of whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction.

9. If appropriate, this instruction may be modified to include a "business judgment" and/or a "pretext" instruction. *See infra* Model Instructions 5.94, 5.95.

5.71A 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - SPECIAL INTERROGATORIES REGARDING "PROTECTED SPEECH" BALANCING ISSUES

To assist the Court in determining whether plaintiff's [describe the speech upon which plaintiff's claim is based--*e.g.*, "memo to Principal Jones dated January 24, 1989"][1] was protected by the First Amendment to the United States Constitution, you are directed to consider and answer the following questions:

1. Did plaintiff's [memo to Principal Jones dated January 24, 1989] cause, or could it have caused, disharmony or disruption in the workplace?[2]
2. Did plaintiff's [January 24, 1989, memo to Principal Jones] impair [his/her] ability to perform [his/her] duties?[3]

Please use the Supplemental Verdict Form to indicate your answers to these questions.[4]

Committee Comments

The Eighth Circuit has indicated that, whenever the *Pickering* balancing process must be invoked to determine whether the plaintiff's speech was protected by the First Amendment, "[a]ny underlying factual disputes . . . should be submitted to the jury through special interrogatories or special verdict forms." *Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993). This instruction is designed to meet the mandate of *Shands*. *See generally* Committee Comments to Model Instruction 5.71, *infra*. If the plaintiff's speech clearly is "protected" without reference to the *Pickering* balancing analysis, this instruction should not be used.

Although the *Shands* decision described a number of factors to be utilized in the balancing process, only two seem likely to raise factual issues which warrant the submission of special interrogatories: whether the plaintiff's speech caused, or could have caused, disharmony or disruption in the workplace; and whether the speech impaired the plaintiff's ability to perform his or her job. The other relevant factors--which deal with the "need for harmony in the workplace," the "degree of public interest in the speech," the "context in which the dispute arose," and the "time, manner, and place of the speech"--typically will not present factual issues for the jury. Nevertheless, this instruction should be tailored to the particular situation at hand by adding, deleting, or modifying the relevant questions. If there is an issue concerning the time, place, or manner of the speech, it should be resolved by the jury. For example, if the plaintiff contends that he/she made the crucial remark at a public meeting while the defendant claims the remark was made in a private conversation, the issue should be submitted to the jury by means of a special interrogatory, such as:

Did the plaintiff make his/her statement [describe the statement - *e.g.*, about corporal punishment of students] at the public school board meeting of May 1, 1992?

Similarly, if there is a material dispute over the precise content of the plaintiff's speech, it appears that the issue must be resolved by the jury. In resolving any such factual dispute, deference must be given to the honest and reasonable perception of the defendant. *Waters v. Churchill*, 511 U.S. 661 (1994). Thus, if the defendant takes the position that it terminated the plaintiff based on a third-party report that the plaintiff engaged in unprotected insubordination, the following sequence of interrogatories may be appropriate:

1. Did plaintiff say that his/her supervisor was incompetent?

Yes _____ No _____

Note: If your answer is "yes," you should not answer Question No. 2. If your answer is "no," continue on the Question No. 2.

2. Did defendant honestly and reasonably believe the report of [name plaintiff's coworker or other source of third-party report] that plaintiff had referred to his/her supervisor as incompetent?

Yes _____ No _____

In general, it appears that the plaintiff has the burden of showing that his or her speech was constitutionally protected. *See Cox v. Miller County R-1 School Dist.*, 951 F.2d 927, 931 (8th Cir. 1991); *Stever v. Independent School Dist. No. 625*, 943 F.2d 845, 849-50 (8th Cir. 1991). However, it is unclear whether the plaintiff should bear the risk of nonpersuasion on every subsidiary factual issue. Accordingly, this instruction does not include any "burden of proof" language. It also should be noted that the ultimate balancing test rests within the province of the Court and that no particular factor is dispositive. *See Shands*, 993 F.2d at 1344, 1346.

Notes on Use

1. Describe the speech upon which the plaintiff bases his or her claim.

2. The first two factors mentioned in *Shands* relate to "the need for harmony in the office or work place" and "whether the government's responsibilities required a close working relationship to exist between the plaintiff and co-workers." *Shands*, 993 F.2d at 1344. The second factor mentioned in *Shands* addresses whether the plaintiff's speech caused or could have caused deterioration in plaintiff's working relationships. *Shands*, 993 F.2d at 1344. This question is designed to test this issue.

3. Yet another balancing factor mentioned in *Shands* is whether the speech at issue impaired the plaintiff's ability to perform his or her assigned duties. *See Shands*, 993 F.2d at 1344. This question is designed to test this issue. As discussed in the Committee Comments, this list of questions is not required in all cases, nor is it all-inclusive. If other issues exist concerning the context or content of the plaintiff's speech, additional questions should be included.

4. The jury's answers to the special interrogatories should be recorded on a Supplemental Verdict Form. *See infra* Model Instruction 5.75A.

5.72 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - ACTUAL DAMAGES

If you find in favor of plaintiff under Instruction ____,[1] then you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)][2] of the evidence will fairly and justly compensate plaintiff for any actual damages you find plaintiff sustained as a direct result of defendant's conduct as submitted in Instruction _____.[3] Actual damages include any wages or fringe benefits you find plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge], through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by plaintiff during that time.[4] Actual damages also may include [list damages supported by the evidence].[5]

[You are also instructed that plaintiff has a duty under the law to "mitigate" his damages--that is, to exercise reasonable diligence under the circumstances to minimize his damages. Therefore, if you find by the [(greater weight) or (preponderance)] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to him, you must reduce his damages by the amount he reasonably could have avoided if he had sought out or taken advantage of such an opportunity.][6] [Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][7]

Committee Comments

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). Moreover, because section 1983 damages are not limited to back pay, the instruction also permits the recovery of general damages for pain, suffering, humiliation, and the like.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Industries*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same) *but cf. Blum v Witco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction which submits this issue in more direct terms.

Notes on Use

1. Insert the number or title of the "essential element" instruction here.

2. Select the bracketed language which corresponds to the burden-of-proof instruction given.

3. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

4. This sentence should be used to guide the jury in calculating the plaintiff's economic damages. In section 1983 cases, however, a prevailing plaintiff may recover actual damages for emotional distress and other personal injuries. *See Carey v. Piphus*, 435 U.S. 247 (1978). The words following "*minus*" are accurate only to the extent that they refer to employment that has been taken in lieu of the employment with the defendant. That is significant where, for example, the plaintiff had a part-time job with someone other than the defendant *before* the discharge and retained it after the discharge. In that circumstance, the amount of earnings and benefits from that part-time employment received after the discharge should not be deducted from the wages or fringe benefits the plaintiff would have earned with the defendant if he or she had not have been discharged, unless the part-time job was enlarged after the discharge. In such a case, the instruction should be modified to make it clear to the jury which income may be used to reduce plaintiff's recovery.

5. In section 1983 cases, a prevailing plaintiff may recover damages for mental anguish and other personal injuries. The specific elements of damages that may be set forth in this instruction are similar to those found in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981a(b)(3). *See infra* Model Instructions 5.02 n.8, and 4.51.

6. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

7. This paragraph may be given at the trial court's discretion.

5.73 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - NOMINAL DAMAGES

If you find in favor of plaintiff under Instruction ____,[1] but you find that plaintiff's damages have no monetary value, then you must return a verdict for plaintiff in the nominal amount of One Dollar ($1.00).[2]

Committee Comments

Most employment discrimination cases involve lost wages and benefits. Nevertheless, a nominal damage instruction should be given in appropriate cases, such as where a plaintiff claiming a discriminatory harassment did not sustain any loss of earnings. *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 542-43, 548 (8th Cir. 1984).

An award of nominal damages can support a punitive damage award. *See Goodwin v. Circuit Court of St. Louis County*, 729 F.2d at 548.

If nominal damages are submitted, the verdict form must contain a line where the jury can make that finding.

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

5.74 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - PUNITIVE DAMAGES

In addition to actual damages, the law permits the jury under certain circumstances to award the injured person punitive damages in order to punish the defendant[1] for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

If you find in favor of plaintiff and against defendant (name), [and if you find by the [(greater weight) or (preponderance)][2] of the evidence that plaintiff's firing was motivated by evil motive or intent, or that defendant was callously indifferent to plaintiff's rights],[3] then in addition to any damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or to deter defendant and others from like conduct in the future. Whether to award plaintiff punitive damages, and the amount of those damages are within your discretion.

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed such defendants may be the same or they may be different.][4]

Committee Comments

Punitive damages are recoverable under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30 (1983).

Notes on Use

1. Public entities, such as cities, cannot be sued for punitive damages under section 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Consequently, the target of a punitive damage claim must be an individual defendant, sued in his/her individual capacity.

2. Select the bracketed language that corresponds to the burden-of-proof instruction given.

3. *See infra* Model Instruction 5.24 n.2.

4. The bracketed language is available for use if punitive damage claims are submitted against more than one defendant.

5.75 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - VERDICT FORM

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [First Amendment retaliation][1] claim of plaintiff [John Doe], as submitted in Instruction _____,[2] we find in favor of

_____

(Plaintiff John Doe) or (Defendant Sam Smith)

Note: Complete the following paragraphs only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's (name) damages as defined in Instruction _____[3] to be:

$_____ (stating the amount or, if none, write the word "none")[4] (stating the amount, or if you find that plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).[5]

We assess punitive damages against defendant (name), as submitted in Instruction _____,[6] as follows:

$_____ (stating the amount or, if none, write the word "none").

_____

Foreperson

Date: _____

Committee Comments

See infra Model Instruction No. 5.35.

Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential element" instruction should be inserted here.

3. The number or title of the "actual damages" instruction should be inserted here.

4. Use this phrase if the jury has not been instructed on nominal damages.

5. Use this phrase if the jury is instructed on nominal damages.

6. The number or title of the "punitive damages" instruction should be inserted here.

5.75A 42 U.S.C. § 1983 - FIRST AMENDMENT RETALIATION - SPECIAL INTERROGATORIES ON "BALANCING" ISSUES

SUPPLEMENTAL VERDICT FORM

As directed in Instruction No. _____,[1] we find as follows:

Question No. 1: Did plaintiff's [memo to Principal Jones][2] cause, or could it have caused, disharmony or disruption in the workplace?

____ Yes ____ No
(Mark an "X" in the appropriate space)

Question No. 2: Did plaintiff's [memo to Principal Jones] impair [his/her] ability to perform [his/her] duties?

____ Yes ____ No
(Mark an "X" in the appropriate space)

_____
Foreperson

Date: _____

Committee Comments

See Committee Comments to Instruction No. 5.71A. These special interrogatories are available for use when there are factual disputes underlying the determination of whether or not the plaintiff's speech was protected by the First Amendment. This supplemental verdict form should never be used alone; it always should accompany Model Instructions 5.71, 5.71A and 5.75, *infra*.

The questions listed in this model instruction are for illustration only; in every case, the list of relevant questions must be tailored to the particular situation. It also bears emphasis that the ultimate question of whether the plaintiff's speech was protected is for the Court and that no single factor is dispositive. Accordingly, when this supplemental verdict form is used, the trial court should receive all of the jury's findings and it should postpone its entry of judgment while it fully evaluates the implications of those findings.

Employment Cases -- Element and Damage Instructions

Notes on Use

1. The number or title of the special interrogatory instruction should be inserted here. *See infra* Model Instruction 5.71A.

2. Describe the speech upon which the plaintiff bases his or her claim. This description should be identical to the phrase used in the special interrogatory instruction. *See infra* Model Instruction 5.71A.

5.80 CASES UNDER THE FAMILY AND MEDICAL LEAVE ACT (FMLA)
Introduction

These instructions are for use with cases brought under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 - 2654. The purposes of the FMLA are to balance the demands on the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. 29 U.S.C. § 2601(b). The Act entitles eligible employees to take up to 12 workweeks of unpaid leave because of a serious health condition that makes the employee unable to perform the functions of his or her position; because of the birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; or to care for the employee's spouse, son, daughter, or parent who has a serious health condition. 29 U.S.C. § 2612, 29 C.F.R. § 825.112.

Employers Covered by the FMLA

A covered employer under the Act is one engaged in commerce or in an industry affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A), *Beal v. Rubbermaid Commercial Products, Inc*., 972 F. Supp. 1216, 1222 n.13 (S.D. Iowa 1997).

Employees Eligible for Leave

Not all employees are entitled to leave under FMLA. Before an employee can take leave to care for himself or herself, or a family member, the following eligibility requirements must be met: he or she must have been employed by the employer for at least 12 months and must have worked at least 1,250 hours during the previous 12-month period. 29 U.S.C. § 2611(2)(A). A husband and wife who are both eligible for FMLA leave and are employed by the same covered employer may be limited by the employer to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for 1) the birth of the employee's son or daughter or to care for that newborn; 2) for placement of a son or daughter for adoption or foster care, or to care for the child after placement; or 3) or to care for the employee's parent. 29 C.F.R. § 202(a).

Family Members Contemplated by the FMLA

Employees are also eligible for leave when certain family members – his or her spouse, son, daughter, or parent – have serious health conditions. Spouse means a husband or wife as defined or recognized under state law where the employee resides, including common law spouses in states where common law marriages are recognized. 29 U.S.C. 2611(13); 29 C.F.R. § 825.113.

Under the FMLA, a son or daughter means a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or who is age 18 or older but is incapable of self-care because of a mental or physical disability. 29 U.S.C. §

2611(12); 29 C.F.R. § 825.113(c). Persons with "*in loco parentis*" status under the FMLA include those who had day-to-day responsibility to care for and financially support the employee when the employee was a child. 29 C.F.R. § 113(c)(3).

"Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. 29 C.F.R. § 825.113(c)(1).

"Activities of daily living" include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. *Id.* "Instrumental activities of daily living" include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. *Id.* "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 29 C.F.R. § 825.113(c)(2). These terms are defined in the same manner as they are under the Americans with Disabilities Act. *Id.*

Parent means a biological parent or an individual who stands or stood *in loco parentis* to an employee when the employee was a son or daughter. 29 U.S.C. § 2611(7). The term "parent" does not include grandparents or parents-in-law unless a grandparent or parent-in-law meets the *in loco parentis* definition. *Krohn v. Forsting*, 11 F. Supp.2d 1082, 1091 (E.D. Mo. 1998); 29 C.F.R. § 825.113(b).

Leave for Birth, Adoption or Foster Care

The FMLA permits an employee to take leave for the birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement. 29 U.S.C. § 2612(a); 29 C.F.R. § 825.100.

The right to take leave under the FMLA applies equally to male and female employees. A father as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child. 29 C.F.R. § 825.112(b). Circumstances may require that the FMLA leave begin before the actual date of the birth of a child or the actual placement for adoption of a child. For example, an expectant mother may need to be absent from work for prenatal care, or her condition may make her unable to work. In addition, if an absence from work is required for the placement for adoption or foster care to proceed, the employee is entitled to FMLA leave. 29 C.F.R. § 825.112(c)-(d).

An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement unless state law allows, or the employer permits, leave to be taken for a longer period. 29 C.F.R. § 825.201. Any such FMLA leave must be concluded during this one-year period. *Id.* An employee is not required to designate whether the leave the employee is taking is FMLA leave or leave under state

law. 29 C.F.R. § 825.701. If an employee's leave qualifies for FMLA and state-law leave, the leave used counts against the employee's entitlement under both laws. *Id.*

What Constitutes a "Serious Health Condition?"

One of the more frequently litigated aspects of the FMLA is the issue of what type of condition constitutes a "serious health condition" under the Act. The concept of "serious health condition" was meant to be construed broadly, so that the FMLA's provisions are interpreted to effect the Act's remedial purpose. *Stekloff v. St. John's Mercy Health Systems*, 218 F.3d 858, 862 (8th Cir. 2000). The phrase is defined in the regulations as an illness, injury, impairment or physical or mental condition that involves inpatient care, a period of incapacity combined with treatment by a health care provider, pregnancy or prenatal care, chronic conditions, long-term incapacitating conditions, and conditions requiring multiple treatments. 29 C.F.R. § 825.114(a).

Specifically, inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with the inpatient care. 29 C.F.R. § 825.114(a)(1).

Incapacity plus treatment means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves: 1) treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider; or 2) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. 29 C.F.R. § 825.114(a)(2)(i). In some circumstances, the regulatory definition of incapacity offers limited guidance. *See, e.g., Caldwell v. Holland of Texas*, 208 F.3d 671, 675 (8th Cir. 2000) (in situation where three-year-old child did not work or attend school, the FMLA regulations offered insufficient guidance for determining whether child was incapacitated and fact finder must determinate whether the child's illness demonstrably affected his normal activity).

Pregnancy or prenatal care includes any period of incapacity due to the pregnancy or prenatal care, such as time off from work for doctors' visits. 29 C.F.R. § 825.114(a)(2)(ii).

A chronic health condition means a condition which requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider, which continues over an extended period of time (including recurring episodes of a single underlying condition), and may cause episodes of incapacity (inability to work, attend school or perform other regular daily activities) rather than continuing incapacity. 29 C.F.R. § 825.114(a)(2)(iii).

Long-term incapacitating conditions are those for which treatment may not be effective, but require continuing supervision of a health care provider, even though the patient may not be receiving active treatment. 29 C.F.R. § 825.114(a)(2)(iv).

Conditions requiring multiple treatments includes any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment. 29 C.F.R. § 825.114(a)(2)(v).

The FMLA regulations provide some guidance concerning what is and is not a serious health condition. For example, the following generally do not fall within the definition of a serious health condition: routine physical, eye or dental examinations; treatments for acne or plastic surgery; common ailments such as a cold or the flu, ear aches, upset stomach, minor ulcers, headaches (other than migraines); and treatment for routine dental or orthodontic problems or periodontal disease. 29 C.F.R. § 114(b),(c). While the above conditions are not generally considered "serious," the Eighth Circuit has held that some conditions, such as upset stomach or a minor ulcer, could still be "serious health conditions" if they meet the regulatory criteria, for example, an incapacity of more than three consecutive calendar days that also involved qualifying treatment. *Thorson v. Gemini, Inc.*, 205 F.3d 370, 379 (8th Cir. 2000).

In addition, the regulations provide guidance regarding what conditions commonly are considered serious health conditions. For example, chronic conditions could include asthma, diabetes or epilepsy; long-term incapacitating conditions could include Alzheimer's, a severe stroke or the terminal stages of a disease; and conditions requiring multiple treatments could include cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis). 29 C.F.R. § 825.114(a).

The regulations also provide that the phrase "continuing treatment" as used in the definition of serious health condition, includes a course of prescription medication and therapy, but not over-the-counter medications, bed-rest or exercise. 29 C.F.R. § 825.114(b).

Courts in the Eighth Circuit have provided additional guidance regarding what constitutes a serious health condition. In *Beal v. Rubbermaid Commercial Products, Inc.*, 972 F. Supp. 1216 (S.D. Iowa 1997), *aff'd* 1998 U.S. App. LEXIS 9295 (8th Cir. 1998) the court analyzed several conditions against the regulatory definition. The court found that a minor back ailment, eczema, and non-incapacitating bronchitis were not serious health conditions under the FMLA. *Id.* at 1223-25. The court also held that an employee was not entitled to FMLA leave subsequent to her son's death noting "[l]eave is not meant to be used for bereavement because a deceased person has no basic medical, nutritional, or psychological needs which need to be cared for." *Id*. at 1216.

In addition, the Eighth Circuit has held that exams and evaluations given to an employee's child to determine whether the child had been sexually molested did not amount to treatment for a serious health condition covered by the FMLA. *Martyszenko v. Safeway, Inc*., 120 F.3d 120, 123-24 (8th Cir. 1997). The alleged molestation did not create a mental condition that hindered the child's ability to participate in any activity at all and did not restrict any of the child's daily activities. *Id.*

Employment Cases -- Element and Damage Instructions

5.81A FMLA – Wrongful Termination – Essential Elements (employee with a serious health condition)

Your verdict must be for the plaintiff [and against defendant][1] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][2] of the evidence:

[*First*, plaintiff was eligible for leave[3];]

First, plaintiff had [specify condition];

Second, [specify condition] was a serious health condition (as defined in Instruction _____)[4];

Third, plaintiff was [absent from work][5] because of that serious health condition;

Fourth, plaintiff gave defendant appropriate notice (as defined in Instruction _____)[6] of [his/her] need to be [absent from work] [5];

Fifth, defendant [describe employment action taken, e.g., discharged][7] plaintiff;

Sixth, plaintiff's [absence from work][5] was a motivating factor in defendant's decision to [describe employment action taken, e.g., discharge][7] plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)][8].

Committee Comments

The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights under the FMLA. An employee who contends he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School District of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 U.S. Dist. LEXIS 8269, 1996 WL 294341 (D. Kan. 1996)).

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "serious health condition."

5. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee who's leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

6. Insert the number of the Instruction defining "appropriate notice."

7. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. For example, the FMLA also protects employees who requested but were denied leave from retaliatory termination. Insert the language that corresponds to the facts of the case.

8. This language should be used when the defendant is submitting an affirmative defense.

5.81B FMLA – Wrongful Termination – Essential Elements (employee needed to care for spouse, parent, son or daughter with a serious health condition[1])

Your verdict must be for the plaintiff [and against defendant _____][2] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4];]

First, plaintiff's [identify family member] had [specify condition];

Second, [specify condition] was a serious health condition (as defined in Instruction _____)[5];

Third, plaintiff was needed to care for (as defined in Instruction _____)[6] [identify family member];

Fourth, plaintiff was [absent from work][7] to care for [identify family member];

Fifth, plaintiff gave defendant appropriate notice (as defined in Instruction _____)[8] of [his/her] need to be [absent from work][7];

Sixth, defendant [describe employment action taken, e.g., discharged][9] plaintiff;

Seventh, plaintiff's [absence from work][7] was a motivating factor in defendant's decision to [describe employment action taken, e.g., discharge][9] plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)][10].

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave if the employee is needed to care for the employee's spouse, son, daughter or parent with a serious health condition. The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights under the FMLA. An employee who contends he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School District of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 U.S. Dist. LEXIS 8269, 1996 WL 294341 (D. Kan. 1996)).

Notes on Use

1. This Instruction is for use in cases in which the employee's family member had a serious health condition. Instruction 5.81C should be used for cases in which the employee needed leave because of a birth, adoption or foster care.

2. Use this phrase if there are multiple defendants.

3. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the number of the Instruction defining "serious health condition."

6. Insert the number of the Instruction defining "needed to care for."

7. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee who's leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

8. Insert the number of the Instruction defining "appropriate notice."

9. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. For example, the FMLA also protects employees who requested but were denied leave from retaliatory termination. Insert the language that corresponds to the facts of the case.

10. This language should be used when the defendant is submitting an affirmative defense.

5.81C FMLA – Wrongful Termination – Essential Elements (employee leave for birth, adoption or foster care[1])

Your verdict must be for the plaintiff [and against defendant _____][2] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4];]

First, plaintiff was [absent from work][5] because of [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care][6];

Second, plaintiff gave defendant appropriate notice (as defined in Instruction _____)[7] of [his/her] need to be [absent from work][5];

Third, defendant [describe employment action taken, e.g., discharged][8] plaintiff;

Fourth, plaintiff's [absence from work][5] was a motivating factor in defendant's decision to [describe employment action taken, e.g., discharge][8] plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction ____)][9].

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave for the birth of a son or daughter, or for placement with the employee of a son or daughter for adoption or foster care. 29 U.S.C. § 2612(a)(1)(A), (B). The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights under the FMLA. An employee who contends that he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School District of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 U.S. Dist. LEXIS 8269, 1996 WL 294341 (D. Kan. 1996)).

Notes on Use

1. This Instruction is for use in cases in which the employee needed leave because of a birth, adoption or foster care. Instruction 5.81B should be used for cases in which the employee's family member had a serious health condition. This Instruction differs from 5.81B in

that it does not include an element requiring the plaintiff to show that he or she was "needed to care for" the newborn, adopted child or foster child. One of the purposes of the FMLA is to provide time for early parent-child bonding. 1993 U.S. Code Cong. and Admin. News 3, 11; 139 Cong. Rec. H 319, 384, 387, 396; *Kelly Co. v. Marquardt*, 493 N.W.2d 68, 75 (Wis. 1992).

2. Use this phrase if there are multiple defendants.

3. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee who's leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

6. Insert the language that corresponds to the facts of the case.

7. Insert the number of the Instruction defining "appropriate notice."

8. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. For example, the FMLA also protects employees who requested but were denied leave from retaliatory termination. Insert the language that corresponds to the facts of the case.

9. This language should be used when the defendant is submitting an affirmative defense.

5.81D FMLA – Failure to Reinstate – Essential Elements (employee with a serious health condition)

Your verdict must be for the plaintiff [and against defendant _____][1] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][2] of the evidence:

[*First*, plaintiff was eligible for leave[3];]

First, plaintiff had [specify condition];

Second, [specify condition] was a serious health condition (as defined in Instruction _____)[4];

Third, plaintiff was absent from work because of that serious health condition;

Fourth, plaintiff received treatment and was able to return to work and perform the functions of [his/her] job prior to the expiration of the leave period; and

Fifth, defendant refused to reinstate plaintiff to the same or an equivalent position (as defined in Instruction _____)[5] held by plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][2] of the evidence, [or if defendant is entitled to a verdict under (Instruction ____)][6].

Committee Comments

The FMLA entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co*., 1998 U.S. Dist. LEXIS 14979 (E.D. Minn. 1998).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id. See* Instruction 5.84A.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted which corresponds to the burden-of- proof instruction given.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "serious health condition."

5. Insert the number of the Instruction defining "equivalent position."

6. This language should be used when the defendant is submitting an affirmative defense.

5.81E FMLA – Failure to Reinstate -- Essential Elements (employee needed to care for a spouse, son or daughter with a serious health condition[1])

Your verdict must be for the plaintiff [and against defendant)[2] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4];]

First, plaintiff's [identify family member] had [specify condition];

Second, [specify condition] was a serious health condition (as defined in Instruction _____)[5];

Third, plaintiff was needed to care for (as defined in Instruction _____)[6] [his/her] [identify family member] because of that serious health condition;

Fourth, plaintiff was absent from work because [he/she] was caring for [his/her] [identify family member] with the serious health condition;

Fifth, plaintiff was able to return to [his/her] job prior to the expiration of the leave period; and

Sixth, defendant refused to reinstate plaintiff to the same or an equivalent position (as defined by Instruction _____)[7] held by plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][3] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)][8].

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave if the employee is needed to care for the employee's spouse, son, daughter or parent with a serious health condition. The FMLA also entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co*., 1998 U.S. Dist. LEXIS 14979 (E.D. Minn. 1998).

The court may wish to define the phrase "equivalent position." According to the FMLA regulations, an "equivalent position" means a position that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. 29 C.F.R. § 825.215(a). It must involve the same or substantially similar duties

or responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. *Id.*

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id. See* Instruction 5.84A.

Notes on Use

1. This Instruction is for use in cases in which the employee's family member had a serious health condition. Instruction 5.81F should be used for cases in which the employee needed leave because of a birth, adoption or foster care.

2. Use this phrase if there are multiple defendants.

3. The bracketed language should be inserted which corresponds to the burden-of- proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the number of the Instruction defining "serious health condition."

6. Insert the number of the Instruction defining "needed to care for."

7. Insert the number of the Instruction defining "equivalent position."

8. This language should be used when the defendant is submitting an affirmative defense.

5.81F FMLA – Failure to Reinstate -- Essential Elements (employee leave for birth, adoption or foster care[1])

Your verdict must be for the plaintiff [and against defendant)[2] if all of the following elements have been proved by [(the greater weight) or (a preponderance)][3] of the evidence:

[*First*, plaintiff was eligible for leave[4];]

First, plaintiff was absent from work because of [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care][5];

Second, plaintiff was able to return to [his/her] job prior to the expiration of the leave period; and

Third, defendant refused to reinstate plaintiff to the same or an equivalent position (as defined by Instruction _____)[6] held by plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved by [(the greater weight) or (a preponderance)][3] of the evidence, [or if defendant is entitled to a verdict under (Instruction _____)][7].

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave for the birth of a son or daughter, or for placement with the employee of a son or daughter for adoption or foster care. The FMLA also entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co*., 1998 U.S. Dist. LEXIS 14979 (E.D. Minn. 1998).

The court may wish to define the phrase "equivalent position." According to the FMLA regulations, an "equivalent position" means a position that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. 29 C.F.R. § 825.215(a). It must involve the same or substantially similar duties or responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. *Id.*

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id. See* Instruction 5.84A.

Employment Cases -- Element and Damage Instructions

Notes on Use

1. This Instruction is for use in cases in which the employee needed leave because of a birth, adoption or foster care. Instruction 5.81E should be used for cases in which the employee's family member had a serious health condition. This Instruction differs from 5.81E in that it does not include an element requiring the plaintiff to show that he or she was "needed to care for" the newborn, adopted child or foster child. One of the purposes of the FMLA is to provide time for early parent-child bonding. 1993 U.S. Code Cong. and Admin. News 3, 11; 139 Cong. Rec. H 319, 384, 387, 396; *Kelly Co. v. Marquardt*, 493 N.W.2d 68, 75 (Wis. 1992).

2. Use this phrase if there are multiple defendants.

3. The bracketed language should be inserted which corresponds to the burden-of- proof instruction given.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See infra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the language that corresponds to the facts of the case

6. Insert the number of the Instruction defining "equivalent position."

7. This language should be used when the defendant is submitting an affirmative defense.

5.82 FMLA – "Same Decision" Instruction

If you find in favor of plaintiff under Instruction ____,[1] then you must answer the following question in the verdict form[s]: Has it been proved by [(the greater weight) or (a preponderance)][2] of the evidence that defendant would have [describe employment action taken, e.g., discharge][3] plaintiff even if defendant had not considered plaintiff's [absence from work][4].

Committee Comments

While the case law construing "same decision" analysis under the FMLA is sparse, it is likely that courts will determine that a defendant will avoid liability under the FMLA if it convinces a jury that the plaintiff would have suffered the same adverse employment action even if he or she had not taken or requested FMLA leave. *See Peters v. Community Action Comm.*, 977 F. Supp. 1428, 1434 (M.D. Ala. 1997) (defendant can avoid liability in an FMLA case only by proving that it would have made the same decision even if it had not allowed such discrimination). Courts have repeated looked to cases construing the Fair Labor Standards Act (FLSA) for guidance in construing the FMLA. *See e.g. Morris v. VCW, Inc.* 1996 U.S. Dist. LEXIS 19201 (W.D. Mo. 1996). In retaliation cases under the FLSA, courts have determined that a plaintiff cannot prevail if the defendant can show that he or she would have been terminated regardless of the FLSA activity. *See e.g. McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996); *Reich v. Davis*, 50 F.3d 962 (11th Cir. 1995).

This result is different than cases under the Americans With Disabilities Act (ADA), which adopted Title VII remedies. *See Doane v. City of Omaha*, 115 F.3d 624, 629 (8th Cir. 1997); *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995).

Notes on Use

1. Insert the number or title of the essential elements Instruction here.

2. Select the bracketed language that corresponds to the burden-of-proof Instruction given.

3. Select the language that corresponds to the facts of the case.

4. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee who's leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

5.83A FMLA – Definition: "Needed to Care For"

An employee is "needed to care for" a spouse, son, daughter or parent with a serious health condition (as defined in Instruction _____)[1] when the family member is unable to care for his or her own basic medical, hygienic or nutritional needs or safety; or is unable to transport himself or herself to the doctor. [The phrase also includes providing psychological comfort and reassurance which would be beneficial to a family member with a serious health condition (as defined in Instruction _____)[1] who is receiving inpatient or home care. The phrase also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.[2]]

Committee Comments

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.116(a)-(b).

Notes on Use

1. Insert the number of the Instruction defining "serious health condition."

2. The definition of "needed to care for" is more expansive than it first appears for it includes situations in which the employee's presence or assistance would provide psychological comfort or assurance to a family member, and instances in which the employee may need to make arrangements for care. In cases in which any of these situations are applicable, this Instruction should be modified to include the additional definition(s).

5.83B FMLA – Definition: "Serious Health Condition"

A "serious health condition" means an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital, hospice, or residential medical care facility, or 2) continuing treatment by a health care provider (as defined in Instruction _____)[1].

Committee Comments

This relatively brief definition is the statutory definition. 29 U.S.C. § 2611(11). A more detailed definition is supplied by the FMLA regulations and included as an alternate definition in these model instructions. 29 C.F.R. § 825.114. *See infra* Model Instruction 5.83C.

Notes on Use

1. Insert the number of the Instruction defining "health care provider."

5.83C FMLA — Definition: "Serious Health Condition" (alternate)

The phrase a "serious health condition" as used in these instructions means an illness, injury, impairment, or physical or mental condition that involves:

[Inpatient care (for example, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with the inpatient care)];

OR

[Incapacity plus treatment, which means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive days, including any subsequent treatment or period of incapacity relating to the same condition, that <u>also</u> involves:

1) Treatment two or more times by a health care provider (as defined in Instruction _____)[1], by a nurse or physician's assistant under direct supervision of a health care provider (as defined in Instruction _____)[1], or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider (as defined in Instruction _____)[1]; or

2) Treatment by a health care provider (as defined in Instruction _____)[1]on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider (as defined in Instruction _____)[1]];

OR

[Any period of incapacity (inability to work, attend school or perform other regular daily activities) due to pregnancy or for prenatal care];

OR

[A chronic health condition, which means a condition which requires periodic visits for treatment by a health care provider (as defined in Instruction _____)[1], or by a nurse or physician's assistant under direct supervision of a health care provider (as defined in Instruction _____)[1], which continues over an extended period of time (including recurring episodes of a

single underlying condition), and may cause episodes of incapacity (inability to work, attend school or perform other regular daily activities) rather than continuing incapacity];

OR

[A period of incapacity (inability to work, attend school or perform other regular daily activities) which is permanent or long-term due to a condition for which treatment may not be effective, but requires continuing supervision of a health care provider (as defined in Instruction _____)[1], even though the patient may not be receiving active treatment];

OR

[Any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider (as defined in Instruction _____)[1], or by a provider of health care services under orders of, or on referral by, a health care provider (as defined in Instruction _____)[1], either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment.][1]

Committee Comments

This instruction is based on the definition of "serious health condition" as set forth in the FMLA regulations at 29 C.F.R. § 825.114. *See* comments regarding Instruction 5.80 for further discussion of the definition of a serious health condition.

Notes to Use

1. Select the language that corresponds to the facts of the case. Within each optional definition, the language also may need to be adjusted on a case-by-case basis due to varying facts. For example, the court may wish to delete the language "or by a nurse or physician's assistant under direct supervision of a health care provider" if the facts of the case do not indicate that treatment was provided by someone other than the health care provider.

5.83D FMLA — Definition: "Health Care Provider"

As used in these instructions the phrase "health care provider" includes [doctor of medicine, doctor of osteopathy, podiatrist, dentist, clinical psychologist, optometrist, nurse practitioner, nurse-midwife, or clinical social worker][1], so long as the provider is authorized to practice in the State and is performing within the scope of his or her practice.

Committee Comments

The FMLA defines "health care provider" as:

> (A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
>
> (B) any other person determined by the Secretary [of Labor] to be capable of providing health care services.

29 C.F.R. § 825.118.

The regulations promulgated by the Department of Labor defined additional persons "capable of providing health care services" to include the workers described in the model Instruction as well as 1) chiropractors, if treatment is limited to "manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist;" 2) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; 3) any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and 4) a health care provider who falls within one of the specifically mentioned categories who practices in a country other than the United States, so long as he or she is authorized to practice in accordance with the law of that country and is performing with the scope of his or her practice. The regulations state that "authorized to practice in the State" means that the health care provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider. 29 C.F.R. § 825.118.

Notes on Use

1. The bracketed language is not exhaustive of the types of health care workers who can meet the regulatory definition of a health care provider. For a full discussion, see the Committee Comments, *infra.* Insert the appropriate language to include the type of health provider(s) relevant to the case.

5.83E FMLA — Definition: "Appropriate Notice" – Leave Foreseeable[1]

The phrase "appropriate notice" as used in these instructions means that [he/she] must have notified defendant of [his/her] need for leave at least 30 days before the leave was to begin.

Committee Comments

The FMLA requires that employees provide adequate notice to their employers of the need to take leave. If the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, an employee must give the employer at least 30 days advance notice before the leave is to begin. 29 C.F.R. § 825.302(a). *See also Bailey v. Amsted*, 172 F.3d 1041 (8th Cir. 1999). An employee need not invoke the FMLA by name in order to put an employer on notice that the FMLA may have relevance to the employee's absence from work. *Thorson v. Gemini*, 205 F.3d 370, 381 (8th Cir. 2000). The employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave. *Id.*

Notes on Use

1. This Instruction should be used in situations where plaintiff's need for leave was foreseeable.

5.83F FMLA — Definition: "Appropriate Notice" – Leave Unforeseeable[1]

The phrase "appropriate notice" as used in these instructions means that [he/she] must have notified defendant of [his/her] need for leave as soon as practicable after [he/she] learned of the need to take leave.

Committee Comments

The FMLA requires that employees provide adequate notice to their employers of the need to take leave. In the case of unexpected absences where 30 days advance notice is not possible, the regulations require the employee to give the employee notice "as soon as practicable." 29 C.F.R. § 825.302(a). *See also Bailey v. Amsted*, 172 F.3d 1041 (8th Cir. 1999). The regulations further state that ordinarily "as soon as practicable" requires the employee to give at least verbal notification within one or two business days after the employee learns of the need for leave. 29 C.F.R. § 825.302(b). *See also Browning v. Liberty Mutual Insurance Company*, 178 F.3d 1043, 1049 (8th Cir. 1999); *Carter v. Ford Motor Co.*, 121 F.3d 1146 (8th Cir. 1997). An employee need not invoke the FMLA by name in order to put an employer on notice that the FMLA may have relevance to the employee's absence from work. *Thorson v. Gemini*, 205 F.3d 370, 381 (8th Cir. 2000). The employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave. *Id.*

Notes on Use

1. This Instruction should be used in situations where plaintiff's need for leave was unforeseeable.

Employment Cases -- Element and Damage Instructions

5.83G FMLA — Definition: "Equivalent Position"

An "equivalent position" means a position that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties or responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

Committee Comments

This definition is taken from the FMLA regulations at 29 C.F.R. § 825.215(a).

5.84 FMLA – Exception to Job Restoration (key employee)

Your verdict must be for the defendant if it has been proved by [(the greater weight) or (a preponderance)][1] of the evidence that plaintiff was a key employee and that denying job restoration to plaintiff was necessary to prevent substantial and grievous economic injury to the operations of the employer. In considering whether or not plaintiff was a key employee you may consider factors such as whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and the cost of reinstating the employee.

Committee Comments

An employer may deny job restoration to a "key employee" if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 C.F.R. § 825.216(c). In determining what constitutes a substantial and grievous economic injury, the focus should be on the extent of the injury to the employer's operations, not whether the absence of the employee will cause the injury. 29 C.F.R. § 825.218(a). This standard is different and more stringent than the "undue hardship" test under the Americans with Disabilities Act. 29 C.F.R. § 825.218(d). While a precise definition is not provided in the regulations, factors to consider in making that determination are provided at 29 C.F.R. § 825.218(b). They include whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and the cost of reinstating the employee. *Id.*

The court may wish to define "key employee," which is defined by FMLA regulation as a salaried employee who is eligible to take FMLA leave and who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employer's worksite. 29 C.F.R. § 825.217(a). The method of determining whether the employee is "among the highest paid 10 percent" is described in the FMLA regulations. 29 C.F.R. § 825.217(c). No more than 10 percent of the employer's employees within 75 miles of the worksite may be "key employees." 29 C.F.R. § 825.217(c)(2). The term "salaried" has the same meaning under the FMLA as it does under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, as amended. 29 C.F.R. § 825.217(b), 29 C.F.R. § 541.118.

Notes on Use

1. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

5.84A FMLA – Exception to Job Restoration (employee would not have been employed at time of reinstatement)

Your verdict must be for the defendant if it has been proved by [(the greater weight) or (a preponderance)][1] of the evidence that plaintiff would not have been employed by the defendant at the time job reinstatement was requested.

Committee Comments

An employer is not required to provide an employee returning from medical leave "any right, benefit or position of employment other than the right, benefit or position to which the employee would have been entitled had the employee never taken leave. 29 U.S.C. § 2614(a)(3)(B); *Marks v. The School Dist. of Kansas City, Mo*., 941 F. Supp. 886, 892 (W.D. Mo. 1996). Thus, an employee is not entitled to job reinstatement after FMLA leave if the employer can show that the employee would not otherwise have been employed at the time reinstatement is requested. 29 C.F.R. § 825.216(a). For example, an employer is not required to reinstate an employee who was laid off during the course of taking FMLA leave. 29 C.F.R. § 825.216(a)(1).

Notes on Use

1. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

Employment Cases -- Element and Damage Instructions

5.85 FMLA – Actual Damages

If you find in favor of plaintiff under Instruction ____[1] then you must award plaintiff the amount of any wages, salary, and employment benefits plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged on [fill in date of discharge] through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by plaintiff during that time.

[You are also instructed that plaintiff has a duty under the law to "mitigate" [his/her] damages – that is, to exercise reasonable diligence under the circumstances to minimize [his/her] damages. Therefore, if you find by [(the greater weight) or)a preponderance)][2] of the evidence that plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [his/her], you must reduce [his/her] damaged by the amount [he/she] reasonably could have avoided if [he/she] had sought out or taken advantage of such an opportunity.][3]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][4]

Committee Comments

The FMLA provides that a prevailing plaintiff is entitled to recover actual damages and interest thereon plus an additional equal amount as liquidated damages. 29 U.S.C. § 2617(a)(1); *Morris v. VCW, Inc*., 1996 U.S. Dist. LEXIS 19201, *3 (W.D. Mo. 1996). In *Morris*, the court held that an employee could not recover interest because she failed to present evidence at trial regarding the method of calculating the amount of interest. *Id.* at *16.

Where a prevailing plaintiff has not lost wages, salary or employment benefits, he or she may be entitled to other compensation. 29 U.S.C. § 2617. For example, an employee who was denied FMLA leave may be able to recover any monetary losses incurred as a direct result of the FMLA violation, such as the cost of providing for a family member, up to an amount equal to 12 weeks of wages or salary for the employee. 29 U.S.C. § 2617(a)(1).

Notes on Use

1. Insert the number or title of the essential elements instruction here.

2. The bracketed language should be inserted which corresponds to the burden-of- proof Instruction given.

3. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Fieldler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982).

4. This paragraph may be given at the trial court's discretion.

5.86 FMLA – Good Faith Defense to Liquidated Damages

If you find in favor of plaintiff under Instruction _____[1], then you must decide whether defendant acted in good faith. You must find defendant acted in good faith if you find by [(the greater weight) or a preponderance)][2] of the evidence that when defendant [insert defendant's act or omission], defendant reasonably believed that its actions complied with the Family and Medical Leave Act.

Committee Comments

A prevailing plaintiff in an FMLA case is entitled to liquidated damages in an amount equal to actual damages plus interest. 29.U.S.C. § 2617(a)(1); *Morris v. VCW, Inc.*, 1996 U.S. Dist. LEXIS 19201, *3, (W.D. Mo. 1996). In *Morris*, the United States District Court for the Western District of Missouri looked to case law under the Fair Labor Standards Act to determine whether plaintiff was entitled to liquidated damages. *Id.* at *5-6.

The language for this Instruction is based on the court's analysis of the good-faith defense in *Morris,* 1996 U.S. Dist. LEXIS 19201 at *8-10. The FMLA allows an employer may avoid the imposition of liquidated damages if it can show that its act or omission was made in good faith and that it had reasonable grounds for believing it was acting in accordance with the FMLA. 29.U.S.C. § 2617(a)(1)(A)(iii). Good faith requires some duty on the part of the employer to investigate potential liability under the FMLA. *Morris*, 1996 U.S. Dist. LEXIS 19201 at *10.

Notes on Use

1. Insert the number or title of the essential elements Instruction here.

2. Insert the bracketed language which corresponds to the burden-of-proof instruction given.

5.90 MISCELLANEOUS INSTRUCTIONS AND SPECIAL INTERROGATORIES

5.91 DISPARATE TREATMENT CASES - PRETEXT/INDIRECT EVIDENCE INSTRUCTION - ESSENTIAL ELEMENTS

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's (age)[2] discrimination claim][3] if all the following elements have been proved by the [(greater weight) or (preponderance)][4] of the evidence:

First, defendant [discharged][5] plaintiff; and

Second, plaintiff's (age) was a[6] determining factor[7] in defendant's decision.

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, your verdict must be for defendant.

"(Age) was a determining factor" only if defendant would not have discharged plaintiff but for plaintiff's (age); it does not require that (age) was the only reason for the decision made by defendant.[8] [You may find (age) was a determining factor if you find defendant's stated reason(s) for its decision(s) [(is) (are)] not the true reason(s), but [(is) (are)] a "pretext" to hide [(age) (gender) (race)] discrimination].[9]

Committee Comments

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court held that an age discrimination plaintiff may create a submissible issue by showing that the defendant's stated reason for its decision was pretextual. This instruction may be used in "pretext" cases filed under ADEA, § 1981, and § 1983, if the trial court believes it is appropriate to follow the pretext/mixed motive distinction identified in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See* Introductory Note to Section 5. This basic instruction should not be given if the plaintiff is proceeding on a "mixed motive" theory. *Mullins v. Uniroyal, Inc.*, 805 F.2d 307, 309 (8th Cir. 1986). If the trial court is inclined to adhere to the pretext/mixed motive distinction, but cannot determine how to categorize a particular case, *see infra* Model Instruction 5.92.

It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997). *See Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 (8th Cir. 1985); *see generally Bell v. Gas Serv. Co.*, 778 F.2d 512, 516 (8th Cir. 1985) (inquiry should focus on whether age was a determining factor in employer's decision, not on any particular step in the *McDonnell Douglas* paradigm). Instead, the submission to the jury should focus on the ultimate issue of whether intentional discrimination was a determining factor in the defendant's

employment decision. *Washburn v. Kansas City Life Ins. Co.*, 831 F.2d 1404, 1408 (8th Cir. 1987) (ultimate issue is whether intentional discrimination was a determining factor in the action taken by the employer); *Bethea v. Levi Strauss & Co.*, 827 F.2d 355, 357 (8th Cir. 1987) (same); *see also Grebin*, 779 F.2d at 20 n.1 (approving definition of "determining factor").

Plaintiffs can prove that unlawful bias was a "determining factor" by showing "either direct evidence of discrimination or evidence that the reasons given for the adverse action are a pretext to cloak the discriminatory motive." *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1063 (8th Cir. 1988) (emphasis added). "[A]n employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988). *See also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

Notes on Use

1. Use this phrase if there are multiple defendants.

2. This instruction is designed for use in age discrimination cases brought pursuant to the ADEA. It should be modified for race discrimination cases under 42 U.S.C. § 1981 and constitutional discrimination cases under 42 U.S.C. § 1983.

3. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

4. Select the bracketed language which corresponds to the burden-of-proof instruction given.

5. This first element is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

6. Historically, cases have approved use of “a” determining factor in pretext cases. *See Ryther v. KARE 11*, 108 F.3d 832, 846-47 (8th Cir. en banc 1997). However, in *Rockwood Bank v. Gaia*, 170 F.3d 833 (8th Cir. 1999), a panel decision held that “the” determining factor should be used.

7. The phrase "age was a determining factor" must be defined. The Committee sees no problem in allowing a plaintiff to submit the issue to the jury using “determining factor” rather than “motivating factor” if plaintiff wishes to do so, even in mixed-motive cases.

8. This definition of the phrase "(age) was a determining factor" is based on *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

9. The bracketed phrase may be added at the court's option in cases in which plaintiff relies on indirect evidence/pretext to prove discriminatory motive.

5.92 SPECIAL INTERROGATORIES TO ELICIT FINDINGS IN BORDERLINE PRETEXT/MIXED-MOTIVE CASES

Directions

The verdict in this case will be determined by your answers to a series of questions set forth below. Make sure that you read the questions and notes carefully because they explain the order in which the questions should be answered and which questions may be skipped.

In Question No. 1, you will be asked whether plaintiff's (age)[1] was a motivating factor[2] in defendant's decision to [discharge][3] [him/her]. If it has been proved that plaintiff's (age) was a motivating factor in defendant's decision, you must answer "yes" to Question No. 1. If it has not been proved, you must answer "no" to Question No. 1.

In Question No. 2, you will be asked whether plaintiff's (age) was a determining factor in defendant's decision to [discharge] [him/her]. "(Age) was a determining factor" only if defendant would not have discharged plaintiff but for plaintiff's (age). It does not require that (age) was the only reason for the decision made by defendant.[4] [You may find that (age) was a determining factor if you find defendant's stated reason(s) for its decision are not the true reason(s), but are a pretext to hide [(age) (gender) (race)] discrimination.][5] If it has been proved that plaintiff's (age) was a determining factor in defendant's decision, you must answer "yes" to Question No. 2. If it has not been proved, you must answer "no" to Question No. 2.

In Question No. 3, you will be asked whether defendant would have [discharged] plaintiff regardless of [his/her] (age). If it has been proved that defendant would have discharged plaintiff regardless of [his/her] (age), you must answer "yes" to Question No. 3. If it has not been proved, you must answer "no" to Question No. 3.

Question No. 4 deals with the amount of damages plaintiff is eligible to recover. In answering Question No. 4, you are instructed to assess plaintiff's damages in accordance with Instruction ____[6] [and Instruction ____].[7]

Question No. 5 deals with whether defendant's conduct was "willful," as defined in Instruction ____.[8]

QUESTIONS

Question No. 1: Has it been proved by the [(greater weight) or (preponderance)] of the evidence that plaintiff's (age)[1] was a motivating factor[2] in defendant's decision to [discharge][3] [him/her]?

_____ Yes _____ No
(Mark an "X" in the appropriate space)

Note: Continue on to Question No. 2 only if you answered "yes" to Question No. 1. If you answered "no" to Question No. 1, you need not answer Questions 2 through 5. You should have your foreperson sign and date this form because you have completed your deliberation on this age-discrimination claim.

Question No. 2: Has it been proved by the [(greater weight) or (preponderance)] of the evidence that plaintiff's (age) was a determining factor in defendant's decision to [discharge] [him/her]?

_____ Yes _____ No
(Mark an "X" in the appropriate space)

Note: Continue on to Question No. 3 only if you answered "no" to Question No. 2. If you answered "yes" to Question No. 2, go directly to Questions No. 4 and 5.

Question No. 3: (Answer this question if you answered "yes" to Question No. 1 and "no" to Question No. 2.) Has it been proved by the [(greater weight) or (preponderance)] of the evidence that defendant would have [discharged] plaintiff regardless of [his/her] (age)?

_____ Yes _____ No
(Mark an "X" in the appropriate space)

Note: Continue on to Questions No. 4 and 5 only if you answered "no" to Question No. 3. If you answered "yes" to Question No. 3, have your foreperson sign and date this form because you have completed your deliberations on this age-discrimination claim.

Question No. 4: (Answer this question only if you answered "yes" to Question No. 2 or "no" to Question No. 3.) What is the amount of plaintiff's damages as that term is defined in

Instruction _____?[6] $_____ (stating the amount [or, if you find that plaintiff' damages have no monetary value, write in the nominal amount of One Dollar ($1.00)]).[7]

Question No. 5: (Answer this question even if you answered "yes" to Question No. 2 or "no" to Question No. 3.) Has it been proved by the [(greater weight) or (preponderance)] of the evidence that defendant's conduct was "willful" as that term is defined in Instruction ____?[8]

_____ Yes _____ No
(Mark an "X" in the appropriate space)

_____
Foreperson

Date: _____

Committee Comments

See Introductory Note to Section 5.

These special interrogatories are designed for use where the trial court is inclined to adhere to a mixed motive/pretext distinction but cannot readily classify a case under a "mixed motive" or "pretext" theory. For example, if plaintiff presents some direct evidence which does not clearly address the employment decision at issue, such as general statements of age bias by the employer, it may be unclear whether the case should be submitted under a "mixed motive" or "pretext" instruction. As explained below, the first three basic interrogatories will permit the court to create a complete record to permit analysis under either theory.

Question No. 1 is designed to test the proof on the "motivating factor" issue. The note following Question No. 1 directs the jury to continue in its analysis only if it answers "yes" to this question. If the jury does not find that unlawful discrimination was a motivating factor, judgment may be entered for the defendant.

Question No. 2 is designed to test the ultimate issue in a "pretext" case of whether plaintiff's age, race, or other protected characteristics was a "determining factor" in the employment decision being challenged. As reflected in the note following Question No. 2, the plaintiff wins under either a pretext or mixed motive theory if the jury finds that unlawful discrimination was a "determining factor." Thus, analysis on the issue of liability should end if the jury answers "yes" to Question No. 2. The jury must go on to Question No. 3 only if it found that discrimination was a motivating factor but not a "determining factor."

Question No. 3 is designed to reach the final issue in a "mixed motive" case. As noted above, the defendant clearly wins if the jury answers "no" to Question No. 1, and the plaintiff clearly wins if the jury answers "yes" to Question No. 2. It also is clear that the defendant wins if the jury answers "no" to Question No. 2 and "yes" to Question No. 3. Thus, the court will be revisited with the issue of whether a case should be classified as "mixed motive" or "pretext" only if the jury reaches Question No. 3 and only if the jury answers "no" to that question. Based on that jury finding, the plaintiff wins if the case is classified under a "mixed motive" theory, while the defendant wins if the case is classified under a "pretext" case theory.

Questions No. 1, 2 and 3 are to be submitted in lieu of, not in conjunction with, any elements instruction. However, actual damages and, if appropriate, a "willfulness" or punitive damages instruction must also be submitted. The Committee makes no recommendation regarding whether all issues should be submitted to the jury simultaneously or whether jury deliberations should be bifurcated and damages and willfulness submitted separately from Questions No. 1, 2 and 3.

Notes on Use

1. This set of interrogatories is designed for use in an age discrimination case. It should be modified for race discrimination cases under 42 U.S.C. § 1981 or constitutional discrimination cases under 42 U.S.C. § 1983.

2. The Committee believes that the term "motivating factor" may be of such common usage that it need not be defined. If the jury has a question regarding this term, the following may be a suitable definition: "The term 'motivating factor' means a consideration that moved the defendant toward its decision." The phrase "a factor that played a part" also may be an appropriate substitute for the phrase "motivating factor." *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101 (8th Cir. 1988). *But cf. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (equating "motivating factor" with "substantial factor").

3. These interrogatories are designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the interrogatories and directions must be modified.

Where the plaintiff resigned but claims that he or she was "constructively discharged," the directions must be modified and an additional interrogatory should be given as a threshold to the interrogatories shown above and the subsequent interrogatories will have to be renumbered. *See infra* Model Instruction 5.93. An appropriate interrogatory would be:

> Question No. 1: Has it been proved by the [(greater weight) or (preponderance)] of the evidence that defendant made plaintiff's working conditions intolerable for the purpose of forcing plaintiff to resign?

_____ Yes _____ No
(Mark an "X" in the appropriate space)

Note: Continue on to Question No. 2 only if you answered Question No. 1 "yes." If you answered this question "no," you need not answer Questions Nos. 2 through 6. You should have your foreperson sign this form because you have completed your deliberations on this age-discrimination claim.

4. The definition of the term "(age) was a determining factor" is based on *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

5. The bracketed phrase may be added at the court's option, in cases in which plaintiff relies primarily on indirect evidence/pretext to prove discriminatory motive.

6. Fill in the number of the "actual damages" instruction here. *See infra* Model Instructions 5.12, 5.22, 5.32. In cases where special interrogatories are submitted instead of an elements instruction, the first two lines of the damages instruction should be modified as follows:

> If you reach Question No. 4 of the Verdict Form, plaintiff's damages are defined as such sum as you find by the . . . .

7. Regarding the submission of the issue of nominal damages, *see infra* Model Instructions 5.13, 5.23, 5.33.

8. Because this model set of interrogatories is designed for age discrimination cases, Question No. 5 is designed to submit the issue of "willfulness." *See infra* Model Instruction 5.14. If the issue of "willfulness" is not submitted in an age discrimination case, Question No. 5 should be omitted; otherwise, insert the number of the "willfulness" instruction here. In cases where special interrogatories are submitted instead of an elements instruction, the first sentence of Model Instruction 5.14 should be modified as follows:

> If you reach Question No. 5 of the Verdict Form, then you must consider whether the conduct of defendant was "willful."

In race discrimination cases and constitutional discrimination cases, Question No. 5 should be used to submit the issue of punitive damages, if appropriate. *See infra* Model Instructions 5.24, 5.34. If the issue of punitive damages is not submitted to the jury, Question No. 5 should be omitted. If the issue of punitive damages is submitted, the "Directions" section of these interrogatories should be modified as follows:

Question No. 5 deals with punitive damages that may be assessed, in accordance with Instruction ___.

Similarly, the "Questions" section of the interrogatories should be modified as follows:

Question No. 5: (Answer this question only if you answered "yes" to Question No. 2 or "no" to Question No. 3). What amount, if any, do you assess for punitive damages as that term is defined in Instruction ___? $_____ (stating the amount or, if none, write the word "none").

Finally, if the issue of punitive damages is submitted in connection with these interrogatories, the first sentence of the second paragraph of the model instructions for punitive damages (Model Instructions 5.24, 5.34, *infra*) should be modified as follows:

If you reach Question No. 5 of the Verdict Form, . . .

5.93 CONSTRUCTIVE DISCHARGE INSTRUCTION

First, defendant made plaintiff's working conditions intolerable, and

Second, plaintiff's (age, race, gender, religion)[1] was a motivating factor[2] in defendant's actions, and

Third, [defendant acted with the intent of forcing plaintiff to quit] or [plaintiff's resignation was a reasonably foreseeable result of defendant's actions][3].

Working conditions are intolerable if a reasonable person in plaintiff's situation would have deemed resignation the only reasonable alternative.[4]

Committee Comments

This instruction is designed for use in connection with the essential elements instruction in cases where the plaintiff resigned but claims that the employer's discriminatory actions forced him or her to do so. *See Barrett v. Omaha National Bank*, 726 F.2d 424, 428 (8th Cir. 1984) ("[a]n employee is constructively discharged when he or she involuntarily resigns to escape intolerable and illegal employment requirements"); *Hukkanen v, International Union of Operating Engineers, Hoisting & Portable Local No.101*, 3 F.3d 281, 285 (8th Cir. 1993) ("[c]onstructive discharge plaintiffs thus satisfy Bunny Breads' intent requirement by showing their resignation was a reasonably foreseeable consequence of their employer's discriminatory actions," thus, adding an alternative method of meeting the standard announced in *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981) (employer's actions "must have been taken with the intention of forcing the employee to quit")). *See also Ogden v. Wax Works, Inc.,* 214 F.3d 999, 1007 n.13 (8th Cir. 2000) ("To establish her constructive discharge, Ogden needed to show that a reasonable person would have found the conditions of her employ intolerable *and that the employer either intended to force her to resign or could have reasonably foreseen she would do so as a result of its actions*.) (Emphasis added.) This instruction should be used in lieu of the first and second elements in the essential elements instructions. *See infra* Model Instructions 5.01 (Title VII), 5.11 (ADEA), 5.21 (42 U.S.C. § 1981), 5.31 (42 U.S.C. § 1983).

Notes on Use

1. Appropriate language should be chosen to reflect the alleged basis for the discrimination. Other prohibited conduct, such as retaliation against someone who has complained of discrimination, may be appropriate.

2. If the trial court decides to submit the case under a "determining factor" liability standard, this instruction should be modified and an appropriate definition of the term "determining factor" should be included. *See infra* Model Instruction 5.91.

3. Select the appropriate phrase or, in some cases both phrases separated by "or" depending on the evidence. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 n.13 (8th Cir. 2000) ("To establish her constructive discharge, Ogden needed to show that a reasonable person would have found the conditions of her employ intolerable *and that the employer either intended to force her to resign or could have reasonably foreseen she would do so as a result of its actions*.) (Emphasis added.)

4. This paragraph aids the jury by providing a definition of what constitutes intolerable working conditions, and explains that the standard is an objective one. *See Williams v. City of Kanas City, Missouri*, 223 F3d 749, 753-54 (8th Cir. 2000) (Williams did not show that her resignation was objectively reasonable where she quit without giving her employer a chance to fix the problem); *see also Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998) (an employee "has an obligation not to assume the worse and jump to conclusions too quickly.").

5.94 BUSINESS JUDGMENT INSTRUCTION - TITLE VII CASES

You may not return a verdict for plaintiff just because you might disagree with defendant's (decision)[1] or believe it to be harsh or unreasonable.

Committee Comments

In *Walker v. AT&T Technologies*, 995 F.2d 846 (8th Cir. 1993), the Eighth Circuit ruled that it is reversible error to deny a defendant's request for an instruction which explains that an employer has the right to make subjective personnel decisions for any reason that is not discriminatory. This instruction is based on sample language cited in the Eighth Circuit's opinion. *See Walker*, 995 F.2d at 849; *cf. Blake v. J.C. Penney Co.*, 894 F.2d 274, 281 (8th Cir. 1990) (upholding a different business judgment instruction as being sufficient).

Notes on Use

1. This instruction makes reference to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--is more appropriate.

5.95 PRETEXT INSTRUCTION

You may find that plaintiff's (age)[1] was a motivating factor in defendant's (decision)[2] if it has been proved by the [(greater weight) (preponderance)][3] of the evidence that defendant's stated reason(s) for its (decision) [(is) (are)] not the true reason(s), but [(is) (are)] a pretext to hide [(age) (gender) (race)] discrimination.

Committee Comments

Plaintiffs can establish unlawful bias through "either direct evidence of discrimination *or* evidence that the reasons given for the adverse action are a pretext to cloak the discriminatory motive." *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1063 (8th Cir. 1988) (emphasis added). "[A]n employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988). This instruction, which is based on *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), may be used in conjunction with the essential elements instruction when the plaintiff relies substantially or exclusively on "indirect evidence" of discrimination. In an attempt to clarify this standard, the Eighth Circuit, in *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997), stated:

> In sum, when the employer produces a nondiscriminatory reason for its actions, the prima facie case no longer creates a legal presumption of unlawful discrimination. The *elements* of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff. This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination.

Id. at 837 (footnote omitted).

Notes on Use

1. This term must be modified if the plaintiff alleges discrimination on the basis of race, gender, or some other prohibited factor.

2. Consistent with the various essential elements instructions in this section, this instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

3. Select the bracketed language which corresponds to the burden-of-proof instruction given.

5.96 DEFINITION OF MOTIVATING FACTOR

As used in these instructions, plaintiff's (sex, gender, race, national origin, religion, disability)[1] was a "motivating factor," if plaintiff's (sex, gender, race, national origin, religion, disability) played a part[2] [or a role[3]][4] in the defendant's decision to _____[5] plaintiff. However, plaintiff's (sex, gender, race, national origin, religion, disability) need not have been the only reason for defendant's decision to _____ plaintiff.

Committee Comments

The Committee recommends giving this definition. A court may decide that the term "motivating factor" need not be defined expressly because its common definition is also the applicable legal definition. "Motivating" is often used in a direct evidence, mixed-motive case brought under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to signify the multiple factors, at least one of which is assertedly unlawful, which caused the adverse employment decision. 42 U.S.C. § 2000e-2(m); *Beshears v. Asbill*, 930 F.2d 1348, 1353-54 (8th Cir. 1991) (ADEA case); *Parton v. GTE North, Inc.*, 971 F.2d 150, 153 (8th Cir. 1992). "Determining factor" is appropriate in an indirect evidence, pretext case brought under the decisional format of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Ryther v. Kare II*, 108 F.3d 832 (8th Cir. en banc 1997); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101-02 (8th Cir. 1988).

Notes on Use

1. Here state the alleged unlawful consideration.

2. *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101-02 (8th Cir. 1988).

3. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.")

4. Case law suggests that other language can be used properly to define "motivating factor." A judge may wish to consider the following alternatives:

The term "motivating factor," as used in these instructions, means a reason, alone or with other reasons, on which defendant relied when it _____ plaintiff[, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989);] or which moved defendant toward its decision to _____ plaintiff[, *id.* at 241;] or because of which defendant _____ plaintiff[, 29 U.S.C. § 623(a)(1) (ADEA); 42 U.S.C. § 2000e-2 (Title VII); 42 U.S.C. § 12112(a) (ADA)].

5. Here state the alleged adverse employment action.

5.97 AFTER-ACQUIRED EVIDENCE[1]

If your verdict is in favor of plaintiff under Instruction No. ___,[2] and if you answered "no" to Question No. 1,[3] then you must answer the following question on your verdict form:

Question No. 2: Has it been proved by [(a preponderance) or (the greater weight)][4] of the evidence that, even if plaintiff had not been terminated on [insert appropriate date], defendant would have terminated[5] plaintiff's employment by [insert appropriate date][6] because [insert brief explanation of defendant's after-acquired reason for termination.][7] ?

Committee Comments

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S.352 (1995), the Supreme Court ruled that an employer's after-acquired evidence of misconduct by the plaintiff does not act as a bar to liability, but it may cut off the plaintiff's damages as of the date the employer discovered the misconduct. The after-acquired evidence doctrine appears to be an affirmative defense which must be pleaded and proven by the employer-defendant.

To establish an after-acquired evidence defense to damages, the employer must establish that "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge." *McKennon*, 513 U.S. at 362-63. It is not enough to show that the misconduct was in violation of company policy or might have justified termination; instead, the employer must show that the after-acquired evidence would have resulted in termination. *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1048 (7th Cir. 1999) ("[p]roving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made") (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989)).

The plaintiff-employee cannot circumvent the after-acquired evidence defense by suggesting that the defendant-employer discovered the prior misconduct during the course of discovery. "Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery and even if the information might have gone undiscovered absent the suit." *McKennon*, 513 U.S. at 362.

Notes on Use

1. This instruction is intended for potential use in cases involving claims of wrongful termination or other adverse employment actions resulting in economic loss to the plaintiff. When given, it ordinarily will be inserted after the essential elements instruction (or, when given, after the

"same decision" instruction) and before the actual damages instruction. In addition to instructing on this issue, the verdict form will need to be modified. *See infra* Model Instruction 5.97A.

2. Insert the number of the "essential elements" instruction given.

3. Insert the number of the "same decision" instruction given. If a "same decision" instruction is not given, this phrase should be deleted.

4. Choose the appropriate term based on the language used in the burden of proof instruction given.

5. The after-acquired evidence defense typically is asserted by the defendant to cut off liability for economic damages by suggesting that the plaintiff would have been terminated if it had been aware of the after-acquired evidence of misconduct. When the defense is based on a different fact pattern -- e.g., the defendant asserts that the plaintiff would have been demoted or transferred to a lower-paying job if it had known of the after-acquired evidence -- the appropriate job action should be identified.

6. Insert the appropriate date based upon defendant's contention of when plaintiff would have been terminated as a result of the after-acquired evidence.

7. Describe the basis for the defendant's after-acquired evidence defense -- e.g. "plaintiff's misrepresentation in his employment application" or "plaintiff's falsification of expense reports."

5.97A MODIFIED VERDICT FORM IN AFTER-ACQUIRED EVIDENCE CASES

Note: Complete the following paragraph by writing in the name required by your verdict.

On the [(sex)[1] discrimination][2] claim of plaintiff [Jane Doe], [as submitted in Instruction ___][3], we find in favor of:

_____

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

Note: Answer the next question only if the above finding is in favor of plaintiff. If the above finding is in favor of defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Question No. 1: Has it been proved by [(the greater weight) or (a preponderance)][4] of the evidence that defendant would have discharged[5] plaintiff on [date on which plaintiff was discharged] regardless of [his/her] (sex)?[6]

_____ Yes _____ No

(Mark an "X" in the appropriate space)

Note: Complete the following paragraphs only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Question No. 2: Has it been proved by [(a preponderance) or (the greater weight)][7] of the evidence that, even if plaintiff had not been terminated on [insert appropriate date], defendant would have terminated[8] plaintiff's employment by [insert appropriate date][9] because [insert brief explanation of defendant's after-acquired reason for termination.][10]?

____ Yes ____ No

(Mark an "X" in the appropriate space)

Note: Continue on to the following paragraphs regardless of how you answered Question No. 2.

We assess plaintiff's damages as follows:

A. Lost wages and benefits from [date of actual termination] through [date used in after-acquired evidence instruction]:

$_____ (stating the amount [or, if none, write the word "none"])

B. Lost wages and benefits from [date used in after-acquired evidence instruction] through the date of your verdict[11]:

$_____ (stating the amount [or, if none, write the word "none"])

C. Plaintiff's other damages, excluding past and future lost wages and benefits:

$_____ (stating the amount [or, if you find that plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar ($1.00)]).[12]

[We assess punitive damages against defendant, as submitted in Instruction ___, as follows:

$_____ (stating the amount or, if none, write the word "none").][14]

_____
Foreperson

Dated: _____

Committee Comments

This model instruction illustrates the modifications to the verdict form in cases where the after-acquired evidence defense is submitted. *See infra* Model Instruction 5.97; *see also infra* Model Instructions 5.05 (Title VII Verdict Form); 5.15 (ADEA Verdict Form); 5.25 (§ 1981 Verdict Form); 5.35 (§ 1983 Verdict Form); 5.75 (First Amendment Verdict Form).

Notes on Use

1. This verdict form is designed for use in a gender discrimination case. It must be modified if the plaintiff is claiming discrimination based on race, religion, age, or some other theory factor.

2. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.

3. The number or title of the "essential elements" instruction may be inserted here.

4. Select the bracketed language that corresponds to the burden-of-proof instruction given.

5. *See infra* Model Instruction 5.97 n.5.

6. This question submits the "same decision" issue to the jury. *See infra* Model Instruction 5.01A.

7. Choose the appropriate term based on the burden of proof instruction given.

8. *See infra* Model Instruction 5.97 n.5.

9. *See infra* Model Instruction 5.97 n.6.

10. *See infra* Model Instruction 5.97 n.7.

11. Although the after-acquired evidence defense would bar recovery of economic damages accruing after the date of discovery of the after-acquired basis for termination, Subparagraph B nevertheless is designed to elicit this finding in the event the after-acquired evidence defense is overruled as a matter of law via post-trial motions or appeal. Front pay is an equitable issue for the judge to decide. *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999) (Title VII case).

12. The Committee takes no position on whether (or to what degree) the after-acquired evidence defense might impact the recovery of compensatory damages. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) was an ADEA case in which the plaintiff's remedy was limited to economic damages.

13. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See infra, e.g.,* Model Instruction 5.04.

6. FRAUD CASES - ELEMENT AND DAMAGE INSTRUCTIONS

Fraud Cases -- Element and Damage Instructions

6.01 FRAUD - ODOMETER

Your verdict must be for plaintiff [and against defendant _____][1] [here generally describe the claim if there is more than one] if all of the following elements have been proved by the [(greater weight) or (preponderance)][2] of the evidence:

First, that defendant or its agent [disconnected, reset, or altered the odometer on the vehicle in question by changing the number of miles indicated thereon];[3] and

Second, that the action of the defendant or its agent was done with the intent to defraud[4] someone.[5]

To act with intent to defraud means to act with intent to deceive or cheat for the purpose of bringing some financial gain to one's self or another.

If any of the above elements has not been proved by the [(greater weight) or (preponderance)] of the evidence, your verdict must be for defendant.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Select the bracketed language which corresponds to the burden-of-proof instruction given.

3. The bracketed language should be used when plaintiff's civil action is based upon a violation of 49 U.S.C. § 32703(2). If the action is premised on an alleged violation of 49 U.S.C. §§ 32703(3) or 32705. the element should be modified as follows:

a) section 32703(3) -

First, that defendant or its agent operated the vehicle in question knowing that the odometer of such vehicle was disconnected or nonfunctional;

b) section 32705 -

First, that defendant or its agent failed to provide an accurate written odometer disclosure statement on the vehicle in question at the time of its transfer;

4. Constructive knowledge, recklessness, or even gross negligence in determining or disclosing actual mileage constitutes intent to defraud. *Tusa v. Omaha Automobile Auction, Inc.*,

712 F.2d 1248 (8th Cir. 1983); *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979); *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978).

5. Privity is unnecessary between the defrauded party and the party who violated the Motor Vehicle Information and Cost Savings Act with an intent to defraud. *Tusa v. Omaha Automobile Auction, Inc*. Plaintiff need only prove that defendant intended to defraud someone.

6.51 ODOMETER FRAUD - DAMAGES

If you find in favor of plaintiff then you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)] of the evidence the amount of damages [he/she] sustained.[1]

Damages include such things as the difference between the fair market value of the vehicle in question with its actual mileage and the amount paid for the vehicle by plaintiff, and such sum as you find will fairly and justly compensate plaintiff for any other damages sustained as a result of the [insert appropriate language such as "the conduct of defendant as submitted in Instruction _____"].[2]

Notes on Use

1. This instruction establishes a damage figure for the purposes of applying the minimum damage figure set by 49 U.S.C. § 32710(a). Under the provisions of this section, plaintiff may, upon proper proof, recover three times the amount of actual damages he or she sustained, or $1,500, whichever is greater. *See Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987); *Beachy v. Eagle Motors, Inc.*, 637 F. Supp. 1093 (N.D. Ind. 1986); *Gonzales v. Van's Chevrolet, Inc.*, 498 F. Supp. 1102 (D. Del. 1980); *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977), *aff'd*, 578 F.2d 721 (8th Cir. 1978). The Committee recommends that, in jury cases, the jury should be directed to determine the amount of actual damages and that the court should apply the statutory formula. *See Gonzales*.

Not only should the court apply the statutory damage formula, but the court, not the jury, should address the issue of attorney fees and costs. The provisions of 49 U.S.C. § 32710(6) permits an award of attorney fees and costs to a prevailing plaintiff. The attorney fee award is determined under the factors set out in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *See Tusa v. Omaha Automobile Auction, Inc.*, 712 F.2d 1248 (8th Cir. 1983); *Duval*.

2. Repair bills and other items of damage are recoverable under 49 U.S.C. § 32710(a) provided they are legitimately attributable to the defendant's acts. *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488, 1495-96 (E.D. Va. 1988); *Duval*.

7 FEDERAL EMPLOYERS' LIABILITY ACT
Introduction

The Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, commonly referred to as the "F.E.L.A.," makes railroads engaging in interstate commerce liable in damages to their employees for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. § 51 (1939).

Although grounded in negligence, the statute does not define negligence; federal case law does so. *Urie v. Thompson*, 337 U.S. 163, 174 (1949). Generally, to prevail on an F.E.L.A. claim, a plaintiff must prove the traditional common law components of negligence including duty, breach, foreseeability, causation and injury. *Adams v. CSX Transp. Inc.*, 899 F.2d 536, 539 (6th Cir. 1990); *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987). This includes whether the defendant railroad failed to use reasonable or ordinary care under the circumstances. *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir. 1976), *cert. denied*, 429 U.S. 1002 (1976); *McGivern v. Northern Pacific Ry. Co.*, 132 F.2d 213, 217 (8th Cir. 1942). Typically, it must be shown that the railroad either knew or should have known of the condition or circumstances that allegedly caused plaintiff's injury. This is referred to as the notice requirement. *See Siegrist v. Delaware, Lackawanna & Western R. Co.*, 263 F.2d 616, 619 (2d Cir.), *cert. denied*, 360 U.S. 917 (1959). Ordinarily, the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury, *Davis*, 541 F.2d at 185, although the exact manner in which the injury occurs and the extent of the injury need not be foreseen, *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 120 (1963).

Although grounded in negligence, the F.E.L.A. is "an avowed departure from the rules of the common law." *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329 (1958). The Act's most distinctive departure from the common law is in the area of causation. The plain language of 45 U.S.C. § 51 (1939) establishes a standard of "in whole or in part" causation which replaces the common law standard of proximate causation. "[T]o impose liability on the defendant, the negligence need not be the proximate cause of the injury." *Nicholson v. Erie R. Co.*, 253 F.2d 939, 940 (2d Cir. 1958). "The F.E.L.A. has its own rule of causation." *Id.* "The test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury which is the subject of the suit." *Fletcher v. Union Pac. R. Co.*, 621 F.2d 902, 909 (8th Cir.), *cert. denied*, 449 U.S. 1110 (1980). The quantum of proof necessary to submit the question of negligence to the jury and the quantum of proof necessary to sustain a jury finding of negligence are also modified under the F.E.L.A.

> It is well established that, under FELA, a case must go to the jury if there is any probative evidence to support a finding of even the slightest negligence on the part of the employer, *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506-07 (1957), and that jury verdicts in favor of plaintiffs can be sustained upon evidence that would

> not support such a verdict in ordinary tort actions, *Heater v. Chesapeake & Ohio Railway*, 497 F.2d 1243, 1246 (7th Cir.), *cert. denied*, 419 U.S. 1013 (1974).

Caillouette v. Baltimore & Ohio Chicago Terminal R. Co., 705 F.2d 243, 246 (7th Cir. 1983).

As the F.E.L.A. has modified the common law negligence case, it has also "stripped" certain defenses from the F.E.L.A. cause of action. *See Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 507-08 (1957). Contributory negligence is no bar to recovery. It may only be used to proportionately reduce the plaintiff's damages. 45 U.S.C. § 53. If the negligence of plaintiff employee is the sole cause of his own injury or death, there is no liability because the railroad did not cause or contribute to cause the employee's injury or death. *New York Cent. R. Co. v. Marcone*, 281 U.S. 345, 350 (1930); *Meyers v. Union Pacific R. Co.*, 738 F.2d 328, 331 (8th Cir. 1984); *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 883 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 827 (5th Cir. 1965). Although assumption of risk is abolished as a defense altogether, 45 U.S.C. § 54, evidence supporting the defense of contributory negligence should not be excluded merely because it also would support an assumption of the risk argument. *Beanland v. Chicago, Rock Island and Pac. R. Co.*, 480 F.2d 109, 116 n.5 (8th Cir. 1973).

Despite the foregoing authorities and F.E.L.A. principles, it must be kept in mind that the provisions of 45 U.S.C. § 51 which establish a negligence cause of action do not establish an absolute liability cause of action. "[T]he Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees." *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949). "That proposition is correct, since the Act imposes liability only for negligent injuries." *Id.*; *cf. Tracy v. Terminal R. Ass'n of St. Louis*, 170 F.2d 635, 638 (8th Cir. 1948). The plaintiff has the burden to prove the elements of the F.E.L.A. cause of action, including the railroad's failure to exercise ordinary care, notice, reasonable foreseeability of harm, causation and damages.

In addition to the negligence cause of action of 45 U.S.C. § 51, the F.E.L.A. also provides for certain causes of action which are not based upon negligence. These are actions brought under the F.E.L.A. for injury caused by the railroad's violation of the Safety Appliance Act (formerly 45 U.S.C. §§ 1-16, recodified as 49 U.S.C. §§ 20301-20304, 21302, 21304 (1994)), or the Boiler Inspection Act (formerly 45 U.S.C. §§ 22-23, recodified as 49 U.S.C. §§ 20102, 20701 (1994)).

Sometimes the same factual circumstances will give rise to a claim under the general negligence provision of the F.E.L.A., as well as a claim under the Safety Appliance Act or a claim under the Boiler Inspection Act. While the same facts may give rise to a combination of these three types of F.E.L.A. claims, the elements of an F.E.L.A. general negligence claim are separate and distinct from those of an F.E.L.A. Safety Appliance Act or F.E.L.A. Boiler Inspection Act claim.

The Safety Appliance Act and Boiler Inspection Act require that certain railroad equipment be kept in certain prescribed conditions. If the equipment is not kept in the prescribed conditions and an employee is thereby injured, the employee may bring a cause of action under 45 U.S.C. § 51.

In such a case, proof of the violation of the Safety Appliance Act or Boiler Inspection Act supplies "the wrongful act necessary to ground liability under the F.E.L.A." *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434 (1949). The Safety Appliance Act and Boiler Inspection Act thus "dispense, for the purposes of employees' suits with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law." *Urie*, 337 U.S. at 189. The United States Supreme Court "early swept all issues of negligence out of cases under the Safety Appliance Act." *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 390 (1949).

In other words, in F.E.L.A. cases brought for injury caused by violation of the Boiler Inspection Act or Safety Appliance Act, care on the part of the railroad is immaterial. "The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous." *Brady v. Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 15 (1938). Likewise, in such cases, care on the part of the employee is immaterial insofar as the defense of contributory negligence is not available to bar the plaintiff's action or to reduce the damages award. 45 U.S.C. § 53, However, if the plaintiff's negligence was the sole cause of the injury or death, then the statutory violation could not have contributed in whole or in part to the injury or death. *Beimert v. Burlington Northern, Inc.*, 726 F.2d 412, 414 (8th Cir. 1984), *cert. denied*, 467 U.S. 1216 (1984).

Despite the elemental differences between these types of cases "(t)he appliance cause often is joined with one for negligence, and even sometimes . . . mingled in a single mongrel cause of action." *O'Donnell*, 338 U.S. at 391. In order to avoid such mingling, claims brought under the general F.E.L.A. negligence provisions of the Act, claims brought under the Safety Appliance Act and claims brought under the Boiler Inspection Act should all be submitted by separate elements instructions. *See infra* Model Instructions 7.01 (elements instruction for claims brought under the general F.E.L.A. negligence provisions of the Act); Model Instruction 7.04 (elements instruction for claims brought under Boiler Inspection Act); Model Instruction 7.05 (elements instruction for claims brought under the Safety Appliance Act).

For a more thorough overview of the F.E.L.A. *see* Richter and Forer, *Federal Employers' Liability Act*, 12 F.R.D. 13 (1951) or Michael Beethe, *Railroads Swing Injured Employees: Should the Federal Employers' Liability Act Allow Railroads to Recover from Injured Railroad Workers for Property Damages?*, 65 U.M.K.C. L. Rev. 231 (1996)

Finally, a motivating purpose for Congress in enacting the F.E.L.A. was to simplify the common law negligence action which had previously provided the injured railroad worker's remedy.

> The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant . . . . [F]or practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the

> employer played any part, however small, in the injury or death which is the subject of the suit.

Rogers, 352 U.S. at 507-8 (footnotes omitted).

Given this purpose of the F.E.L.A. and the nature of the F.E.L.A. cause of action, the instructions in this section are drafted in the same format as are the other instructions in this manual generally. They are drafted to present the jury only those issues material to the questions it is to decide. Toward this goal, abstract statements of law and evidentiary detail are avoided.

A number of jurisdictions submit F.E.L.A. cases by instruction schemes which present propositions of law and paraphrase the underlying statutes. Notable among the jurisdictions which instruct in this manner are Illinois and Arkansas. Although the Committee has adopted the ultimate issue instruction format for this manual in general and the F.E.L.A. instructions in specific, the Committee recognizes that other instruction schemes are equally valuable. None of the instructions in this manual are mandatory, and any court which prefers to use another appropriate instruction set or system should do so.

F.E.L.A. Cases -- Element, Defense and Damage Instructions

7.01 GENERAL F.E.L.A. NEGLIGENCE

Your verdict must be for plaintiff [and against defendant (name of defendant)][1] [on plaintiff's (identify claim presented in this elements instruction as "first," "second," etc.) claim][2] if all of the following elements have been proved by [the greater weight of the evidence] [a preponderance of the evidence][3]:

First, plaintiff [(name of decedent)] was an employee of defendant [(name of defendant)], and[4, 5]

Second, defendant [(name of defendant)] failed to provide:[6]

(reasonably safe conditions for work [in that (describe the conditions at issue)] or)

(reasonably safe tools and equipment [in that (describe the tools and equipment at issue)] or)

(reasonably safe methods of work [in that (describe the methods at issue)] or)

(reasonably adequate help [in that (describe the inadequacy at issue)]), and

Third, defendant [(name of defendant)] in any one or more of the ways described in Paragraph *Second* was negligent,[7] and[8]

Fourth, such negligence resulted in whole or in part[9] in [injury to plaintiff] [the death of (name of decedent)].

If any of the above elements has not been proved by [the greater weight of the evidence] [a preponderance of the evidence], then your verdict must be for defendant [(name of defendant)].[10]

[Your verdict must be for defendant if you find in favor of defendant under Instruction ____ (insert number or title of affirmative defense instruction)].[11]

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim covered by this elements instruction is made.

2. Include this phrase and identify the claim covered by this elements instruction as "first," "second," etc., only if more than one claim is to be submitted. *See* Introduction to Section 7 (discussion of relationship among F.E.L.A. claims for general negligence, violation of the Safety Appliance Act and violation of the Boiler Inspection Act).

3. Use the phrase which conforms to the language of the burden of proof instruction, Model Instruction 3.04, *infra*.

4. The F.E.L.A. provides that the railroad "shall be liable in damages to any person suffering injury *while he is employed* by such carrier . . . ." 45 U.S.C. § 51 (1939) (emphasis added). In the typical F.E.L.A. case, there is no dispute as to whether the injured or deceased person was an employee, and this language need not be included except to make the instruction more readable. However, when there is such a dispute in the case, the term "employee" must be defined. The definition must be carefully tailored to the specific factual question presented, and it is recommended that RESTATEMENT (SECOND) OF AGENCY (1958) be used as a guideline in a manner consistent with the federal authorities. *See Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974) (discussion of Restatement (Second) of Agency (1957) as authoritative concerning meaning of "employee" and "employed" under the F.E.L.A. and as source of proper jury instruction).

5. It may be argued the plaintiff was not acting within the scope of his or her railroad employment at the time of the incident. If there is a question whether the employee was within the scope of employment, paragraph *First* should provide as follows:

> *First*, [plaintiff] [(name of decedent)] was an employee of defendant [(name of defendant)] acting within the scope of (his) (her) employment at the time of (his) (her) [injury] [death] [(describe the incident alleged to have caused injury or death)], and

If this paragraph is included, the term "scope of employment" must be defined in relation to the factual issue in the case. The RESTATEMENT (SECOND) OF AGENCY (1958) is recognized as a guide. *Wilson v. Chicago, Milwaukee, St. Paul and Pac. R. Co.*, 841 F.2d 1347, 1352 (7th Cir.), *cert. dism.*, 487 U.S. 1244 (1988). In rare cases it may be argued that the duties of the employee did not affect interstate commerce and thus are not covered by the Act. Usually if the employee was acting within the scope and course of his employment for the railroad his conduct will be sufficiently connected to interstate commerce to be included within the Act.

6. This paragraph of the elements instruction is designed to present descriptions of the conduct alleged to constitute breach of the railroad's standard of care in the majority of F.E.L.A. cases. These descriptions should focus the jurors' attention upon the evidence without belaboring the elements instruction with evidentiary detail. The description may consist of no more than the appropriate phrase or phrases "reasonably safe conditions for work," "reasonably safe tools and equipment," "reasonably safe methods of work" or "reasonably adequate help." *However, if a more specific description will be helpful to the jury and is deemed by the court to be desirable in the*

particular case, a more specific description should be used. The following are examples of ways in which the applicable phrase may be modified to provide further description:

First, defendant either failed to provide:

reasonably safe conditions for work in that there was oil on the walk-way, or

reasonably safe tools and equipment in that it provided plaintiff with a lining bar that had a broken claw, or

reasonably safe methods of work in that it failed to require plaintiff to wear safety goggles while welding rail, or

reasonably adequate help in that it required plaintiff to lift by himself a track saw that was too heavy to be lifted by one worker, and

7. The terms "negligent" and "negligence" must be defined. *See infra* Model Instructions 7.09, 7.10 and 7.11.

8. If only one phrase describing the railroad's alleged breach of duty is submitted in Paragraph *Second*, then Paragraph *Third* should read as follows:

Third, defendant [(name of defendant)] was thereby negligent, and

9. The standard of causation in an F.E.L.A. case is whether the injury or death was caused "in whole or in part" by the railroad's negligence. 45 U.S.C. § 51; *see infra* Introduction to Section 7. No other causation language is necessary.

The defendant may request an instruction stating that if plaintiff's negligence was the sole cause of his injury, he may not recover under the F.E.L.A. *New York Central R. Co. v. Marcone*, 281 U.S. 345, 350 (1930); *Meyers v. Union Pacific R.R. Co.*, 738 F.2d 328, 330-31 (8th Cir. 1984) (not error to instruct jury, "if you find that the plaintiff was guilty of negligence, and that the plaintiff's negligence was the sole cause of his injury, then you must return your verdict in favor of defendant"). Such a defense may also arise under the Boiler Inspection and Safety Appliance Acts. *See Beimert v. Burlington Northern, Inc.*, 726 F.2d 412, 414 (8th Cir.), *cert. denied*, 467 U.S. 1216 1984).

Sole cause instructions have sometimes been criticized as unnecessary and as confusing. *See Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 883-84 n.1 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); *Almendarez v. Atchison, T. & S.F. Ry. Co.*, 426 F.2d 1095, 1097 (5th Cir. 1970); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 826-27 (5th Cir. 1965). The Committee takes

no position on whether a sole cause instruction should be given in an F.E.L.A. case. If the court decides to give a sole cause type instruction, the following may be appropriate:

> The phrase "in whole or in part" as used in [this instruction] [Instruction _____ (state the title or number of the plaintiff's elements instruction)] means that the railroad is responsible if its negligence, if any, played any part, no matter how small, in causing the plaintiff's injuries. This, of course, means that the railroad is not responsible if any other cause, including plaintiff's own negligence, was solely responsible.*

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 507 (1957); *Page v. St. Louis Southwestern Ry.*, 349 F.2d 820, 826-27 (5th Cir. 1965).

As is the case with any model instruction, if the court determines that some other instruction on the subject is appropriate, such an instruction may be given.

10. This paragraph should not be used if Model Instruction 7.02A or 7.02B is given.

11. Use Model Instruction 7.02C, *infra*, to submit affirmative defenses.

*This instruction may be given as a paragraph in the plaintiff's elements instruction or as a separate instruction.

7.02 DEFENSE THEORY INSTRUCTIONS - THREE OPTIONS

Introduction and Committee Comments

Eighth Circuit case law holds that the defendant in an F.E.L.A. case, like any party in any other civil case, is entitled to a specific instruction on its theory of the case, if the instruction is "legally correct, supported by the evidence and brought to the court's attention in a timely request." *Board of Water Works, Trustees of the City of Des Moines, Iowa v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983). This proposition applies to F.E.L.A. cases. *Chicago & N.W. Ry. Co. v. Green*, 164 F.2d 55, 61 (8th Cir. 1947); *see also Chicago, Rock Island & Pacific Railroad Co. v. Lint*, 217 F.2d 279, 284-86 (8th Cir. 1954) (error to refuse defendant's foreseeability of harm instructions which "more specifically" than the court's instructions presented defendant's theory of defense); *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112-13 (8th Cir. 1988) (defendant in products liability case may be entitled to a sole cause instruction presenting its theory of the case to the jury, if legally correct, supported by the evidence and brought to the court's attention in a timely request).

The 7.02 series of defense theory instructions provides for three alternative formats that a defendant may utilize to present its defense theory to the jury. If defendant's theory is that plaintiff has failed to carry his burden of proof on one or more of the elements of his claim set forth in the elements instruction, the Model Instruction 7.02A format permits instructing the jury that their verdict must be for the defendant unless that element has been proved. The 7.02B format is similar, but does not limit the defendant to the precise language used in the elements instruction. That is, defendant can specify any fact which the plaintiff must prove in order to recover and obtain an instruction stating that defendant is entitled to a verdict unless that fact is proved. Defendant may wish to use this format where the defense theory is that plaintiff has failed to prove notice or reasonable foreseeability of harm.

The formats used in 7.02A and 7.02B are designed to cover defense theories where plaintiff has failed to prove an element of his or her claim. The third category of defense theory instructions, as set forth in Model Instruction 7.02C, *infra*, is designed to cover affirmative defenses where the railroad has the burden of proof.

The court should limit the number of defense theory instructions so as not to unduly emphasize the defense theories in a way that would be unfair to plaintiff. The Committee believes that as a general rule, the defendant should be entitled to at least one defense theory instruction for each claim that plaintiff is separately submitting to the jury. There may be certain cases where more than one defense theory instruction should be given for a particular claim. For example, in an occupational lung disease case, there may be a statute of limitations defense hinging on fact issues to be decided by the jury and there also may be issues as to notice and reasonable foreseeability of harm. In such a case, the court might conclude to give a 7.02C instruction on the affirmative defense of statute of limitations and a 7.02B instruction covering the failure to prove notice or reasonable

foreseeability of harm. If the defendant wants 7.02A and 7.02B instructions to be given in a case, they should be combined in a single defense theory instruction following the 7.02B format. Rather than creating an arbitrary limit on the number of defense theory instructions that may be given, the Committee believes that it is preferable to give the court flexibility and discretion in dealing with each case on its own facts. The operative principles are fairness and evenhanded treatment.

7.02A DEFENSE THEORY INSTRUCTIONS - FAILURE OF PROOF ON ANY ELEMENT OF PLAINTIFF'S CASE LISTED IN THE ELEMENTS INSTRUCTION

Your verdict must be for defendant [(name of defendant)][1] [on plaintiff's (identify claim presented in this instruction as "first," "second," etc.)[2] claim] unless it has been proved by [the greater weight of the evidence] [a preponderance of the evidence][3] that [(specify any element upon which plaintiff bears the burden of proof as listed in the appropriate elements instruction for the particular claim)].

Committee Comments

See Introduction and Committee Comments to the 7.02 series of defense theory instructions for a discussion of the general principles underlying their use.

Model Instruction 7.02A, *infra*, provides a general format that can be used when defendant's theory is that plaintiff has failed to prove an element of his claim *as listed in the elements instruction*. When this format is used, the language in the elements instruction should be repeated verbatim in the defense theory instruction. For example, if the defense theory is the failure to prove causation, the instruction might read: "Your verdict must be for defendant on plaintiff's claim unless it has been proved by the greater weight of the evidence that defendant's negligence resulted in whole or in part in injury to plaintiff."

The defendant may wish to specify in its defense theory instruction more than one element of plaintiff's case that defendant contends has not been proved. If the defendant specifies more than one element from the elements instruction, the defense theory instruction should use the same connecting term ("and" versus "or") as used in the elements instruction. In other words, in specifying conjunctive submissions, the defense theory instruction uses "and" between elements; in specifying disjunctive submissions, it uses "or."

The defendant has the option to specify one or more elements of the elements instruction in its defense theory instruction. The only limitation on defendant's right to specify as much or as little of the elements instruction as desired is with respect to disjunctive submissions. If defendant elects to specify any element which is submitted by the elements instruction in the disjunctive, he must specify *all* such disjunctive elements. For example, if plaintiff's elements instruction submits that defendant either committed negligent act "A" *or* negligent act "B," it would be improper to give a defense theory instruction stating that the verdict must be for the defendant unless the jury believes that negligent act "A" has been proved. Instead, the defense theory instruction would have to specify all of the negligent acts submitted in the elements instruction connected by the word "or."

F.E.L.A. Cases -- Element, Defense and Damage Instructions

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim identified in this instruction is made.

2. Include this phrase and identify the claim represented in this instruction as "first," "second," etc., only if more than one claim is to be submitted. *See* Introduction to Section 7 (discussion of relationship among F.E.L.A. claims for general negligence, violation of the Safety Appliance Act and violation of the Boiler Inspection Act).

3. Use the phrase which conforms to the language of the burden of proof instruction, Model Instruction 3.04, *infra*.

7.02B DEFENSE THEORY INSTRUCTIONS - FAILURE TO PROVE ANY FACT ESSENTIAL TO PLAINTIFF'S RIGHT TO RECOVER

Your verdict must be for defendant [(name of defendant)][1] [on plaintiff's (identify claim as "first," "second," etc.) claim][2] unless it has been proved by [the greater weight of the evidence] [a preponderance of the evidence][3] that [(specify any fact which plaintiff must prove in order to recover)].[4]

Committee Comments

See Introduction and Committee Comments to the 7.02 series of defense theory instructions for a discussion of the general principles underlying their use. If the defendant wants 7.02A and 7.02B instructions to be given in a case, they should be combined in a single defense theory instruction following the 7.02B format.

This defense theory instruction format is similar to the 7.02A format, but differs in that the defendant is not restricted to a repetition of the exact language used in the elements instruction. The 7.02B format is intended by the Committee to address the kind of instruction issues discussed in *Chicago & N.W. Ry. Co. v. Green*, 164 F.2d 55, 61 (8th Cir. 1947) and *Chicago, Rock Island & Pacific Railroad Co. v. Lint*, 217 F.2d 279, 284-86 (8th Cir. 1954). *See* Introduction and Committee Comments to 7.02 series of defense theory instructions.

The Committee anticipates that the 7.02B format can be used, for example, to instruct on plaintiff's burden to prove "notice" and "reasonable foreseeability of harm." For a discussion of these concepts, *see infra* Committee Comments, Model Instruction 7.09.

The close and interdependent relationship of notice and reasonable foreseeability of harm to the ultimate question of whether the railroad exercised due care raises the issue whether the jury should be instructed to make separate findings of notice and reasonable foreseeability of harm in the elements instruction. In *Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525, 527-28 (5th Cir. 1951), and *Patterson v. Norfolk & Western Railway Company*, 489 F.2d 303, 305 (6th Cir. 1973), instructions calling for such separate findings were found improper in that they misrepresented the ultimate question of reasonable or ordinary care. However, in *Chicago, Rock Island & Pacific Railroad Co. v. Lint*, 217 F.2d 279, 284-86 (8th Cir. 1954), it was held error to refuse defendant's notice and reasonable foreseeability of harm instructions which "more specifically" than the court's instructions presented defendant's theory of defense. Similarly, in *Chicago & N.W. Ry. Co. v. Green*, 164 F.2d 55, 61 (8th Cir. 1947), it was error to refuse to give an instruction requested by defendant on defendant's defense theory that plaintiff had failed to prove notice. Other cases of interest are: *Denniston v. Burlington Northern, Inc.*, 726 F.2d 391, 393-94 (8th Cir. 1984) (no plain error in instructing that the plaintiff was required to prove notice); and *Baynum v. Chesapeake & Ohio*

Railway Co., 456 F.2d 658, 660 (6th Cir. 1972) (verdict for plaintiff upon sufficient evidence of notice rendered refusal of notice instruction harmless error).

By way of illustration, assume that plaintiff's submission of negligence is that defendant failed to provide reasonably safe conditions for work in that there was oil on the walkway (*see infra* Model Instruction 7.01 n.8). Assume further that defendant's theory of defense is that defendant did not know and could not have known in the exercise of ordinary care that there was oil on the walkway. The defense theory instruction for this defense might read as follows: "Your verdict must be for defendant unless it has been proved by the greater weight of the evidence that defendant knew or by the exercise of ordinary care should have known that there was oil on the walkway." In other words, a notice defense theory instruction should specify the defect, condition or other circumstance so it will be clear what fact or facts must be proved in order to establish notice.

As an example of a defense theory instruction on reasonable foreseeability of harm, assume a case where plaintiff is claiming occupational lung disease caused by exposure to diesel fumes. The negligence submission from the elements instruction might read: "Defendant failed to provide reasonably safe conditions for work in that plaintiff was repeatedly exposed to diesel fumes." The defense theory instruction on foreseeability of harm might read as follows: "Your verdict must be for defendant unless it has been proved by the greater weight of the evidence that defendant knew or by the exercise of ordinary care should have known that repeated exposure to diesel fumes was reasonably likely to cause harm to plaintiff."

While notice and foreseeability of harm are common defense theories that can be accommodated by the 7.02B format, this format is not limited to those particular theories. This format can be used to specify any fact upon which the plaintiff bears the burden of proof and which fact is essential to plaintiff's right to recover. Of course, it is up to the court to determine what those "essential facts" might be under the case law and under the circumstances of the particular case before the court.

The 7.02B format should not be used to specify a fact upon which the defendant bears the burden of proof. If the defendant bears the burden of proof to establish the defense theory, the 7.02C format should be followed.

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim identified in this instruction is made.

2. Include this phrase and identify the claim represented in this instruction as "first," "second," etc., only if more than one claim is to be submitted. *See* Introduction to Section 7 (discussion of relationship among F.E.L.A. claims for general negligence, violation of the Safety Appliance Act and violation of the Boiler Inspection Act).

3. Use the phrase which conforms to the language of the burden of proof instruction, Model Instruction 3.04, *infra*.

4. Of course, it is an issue of substantive law as to what facts are essential to plaintiff's right to recover. See the examples in the Committee Comments above for instructions on the defense theories of failure to prove notice and failure to prove reasonable foreseeability of harm.

F.E.L.A. Cases -- Element, Defense and Damage Instructions

7.02C DEFENSE THEORY INSTRUCTIONS - AFFIRMATIVE DEFENSES

Your verdict must be for defendant [(name of defendant)][1] [on plaintiff's (identify claim to which this instruction pertains as "first," "second," etc.)[2] claim] if all of the following elements have been proved by [the greater weight of the evidence] [a preponderance of the evidence][3]:

[List in numbered paragraphs each element of any affirmative defense upon which the defendant bears the burden of proof and which, if proved, entitles defendant to a verdict.]

Committee Comments

See Introduction and Committee Comments to the 7.02 series of defense theory instructions for a discussion of the general principles underlying their use.

The 7.02C format is only to be used for affirmative defenses where defendant bears the burden of proof. For example, the affirmative defenses of release and statute of limitations sometimes turn on fact issues to be resolved by the jury. The Committee has not undertaken to prepare model instructions for affirmative defenses. If a particular case requires an affirmative defense instruction, the elements of the affirmative defense should be submitted in separate paragraphs connected by "and." Evidentiary detail should be avoided, but the ultimate factual issues to be resolved by the jury should be specified.

The 7.02C format should not be used in submitting the defense of contributory negligence which, if proved, only reduces plaintiff's recovery. That defense should be submitted under Model Instruction 7.03, *infra*.

Assumption of the risk is no defense whatsoever because it has been abolished altogether in F.E.L.A cases. 45 U.S.C. § 54 (1994).

The defendant may request a defense theory instruction stating that if plaintiff's negligence was the sole cause of his injury, he may not recover under the F.E.L.A. For a discussion of the authorities on sole cause instructions, *see infra* Model Instruction 7.01 n.9. The Committee takes no position on whether a sole cause instruction should be given in an F.E.L.A. case.

Notes on Use

1. If there are two or more defendants in the lawsuit, identify the defendant to whom this instruction applies.

2. Include this bracketed language and identify the claim to which this instruction pertains as "first," "second," etc., only if more than one claim is submitted and one or more of such claims is not subject to the affirmative defense.

3. Use the phrase which conforms to the language of the burden of proof instruction, Model Instruction 3.04, *infra*.

7.03 F.E.L.A CONTRIBUTORY NEGLIGENCE

If you find in favor of plaintiff under Instruction _____ (insert number or title of plaintiff's elements instruction) you must consider whether plaintiff [(name of decedent)][1] was also negligent. Under this Instruction, you must assess a percentage of the total negligence[2] to [plaintiff] [(name of decedent)] [on plaintiff's (identify claim to which this instruction pertains as "first," "second," etc.) claim against defendant [(name of defendant)]][3] if all of the following elements have been proved by [the greater weight of the evidence] [a preponderance of the evidence][4]:

First, [plaintiff] [(name of decedent)] (characterize the alleged negligent conduct, such as, "failed to keep a careful lookout for oncoming trains"),[5] and

Second, [plaintiff] [(name of decedent)] was thereby negligent, and[6]

Third, such negligence of [plaintiff] [(name of decedent)] resulted in whole or in part in [his] [her] injury.[7]

[If any of the above elements have not been proved by [the greater weight of the evidence] [a preponderance of the evidence], then you must not assess a percentage of negligence to [plaintiff] [(name of decedent)].][8]

Committee Comments

Contributory negligence is no bar to recovery under F.E.L.A., "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . ." 45 U.S.C. § 53 (1994).

In a F.E.L.A. case brought for injury or death caused by the railroad's violation of a "statute enacted for the safety of employees," contributory negligence will neither bar the plaintiff's recovery nor reduce his or her damages. *Id.* The Safety Appliance Act (formerly 45 U.S.C. §§ 1-16, recodified at 49 U.S.C. §§ 20301-20304, 21302, 21304 (1994)), and the Boiler Inspection Act (formerly 45 U.S.C. §§ 22-23, recodified at 49 U.S.C. §§ 20102, 20701 (1994)), are statutes enacted for the safety of employees. Therefore, this instruction should not be submitted in a claim brought for violation of the Boiler Inspection Act (Model Instruction 7.04, *infra*) or for violation of the Safety Appliance Act (Model Instruction 7.05, *infra*). *See* Introduction to Section 7 (discussion of relationship among Boiler Inspection Act, Safety Appliance Act and F.E.L.A.).

F.E.L.A. Cases -- Element, Defense and Damage Instructions

Notes on Use

1. This contributory negligence instruction is designed for use in cases in which the employee's injury resulted in death as well as in cases in which the employee's injuries did not result in death. If the employee's injuries resulted in death, identify the decedent by name.

2. The terms "negligent" and "negligence" must be defined. *See infra* Model Instruction 7.09.

3. Include this bracketed language and identify the claim to which this instruction pertains as "first," "second," etc., only if more than one claim is submitted.

If there are two or more defendants in the lawsuit, identify the defendant against whom the claim referred to in this instruction is asserted.

4. Use the phrase which conforms to the language of the burden of proof instruction, Model Instruction 3.04, *infra*.

5. More than one act or omission alleged to constitute contributory negligence may be here submitted in the same way that alternative submissions are made under Model Instruction 7.01. *See infra* Model Instruction 7.01 n.6.

6. If more than one act or omission is alleged as contributory negligence, then Paragraph Second should be modified to read as follows:

> Second, [plaintiff] [(name of decedent)] in any one or more of the ways described in Paragraph First was negligent, and . . . .

7. A single standard of causation is to be applied to the plaintiff's negligence claim and the railroad's claim of contributory negligence. *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 822-24 (5th Cir. 1965).

8. This paragraph is optional. If requested, the court may add this paragraph.

F.E.L.A. Cases -- Element, Defense and Damage Instructions

7.04 F.E.L.A. BOILER INSPECTION ACT VIOLATION

Your verdict must be for plaintiff [and against defendant (name of defendant)][1] [on plaintiff's (identify claim represented in this elements instruction as "first," "second," etc.) claim][2] if all of the following elements have been proved by [the greater weight of the evidence] [a preponderance of the evidence][3]:

First, plaintiff [(name of decedent)] was an employee of defendant [(name of defendant)][4, 5]

Second, the [locomotive] [boiler] [tender] [(identify part or appurtenance of locomotive, boiler or tender which is the subject of the claim)][6] at issue in the evidence was not in proper condition and safe to operate without unnecessary peril to life or limb in that (identify the defect which is the subject of the claim),[7] and[8]

Third, this condition resulted in whole or in part[9] in [injury to plaintiff] [death to (name of decedent)].

If any of the above elements has not been proved by [the greater weight of the evidence] [a preponderance of the evidence], then your verdict must be for defendant [(name of defendant)].[10]

[Your verdict must be for defendant if you find in favor of defendant under Instruction ____ (insert number or title of affirmative defense instruction)].[11]

Committee Comments

The introduction to Section 7 discusses the relationship among the Boiler Inspection Act (formerly 45 U.S.C. §§ 22-23, recodified at 49 U.S.C. §§ 20102, 20701 (1994)), the Safety Appliance Act (formerly 45 U.S.C. §§ 1-16, recodified at 49 U.S.C. §§ 20301-20304, 21302, 21304 (1994)), and F.E.L.A., 45 U.S.C. § 51, 60 (1994).

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim represented in this elements instruction is made.

2. Include this phrase and identify the claim represented in this elements instruction as "first," "second," etc., only if more than one claim is to be submitted.

3. Use the phrase which conforms to the burden of proof instruction, Model Instruction 3.04, *infra*.

4. F.E.L.A. provides that the railroad "shall be liable in damages to any person suffering injury *while he is employed* by such carrier . . . ." 45 U.S.C. § 51 (emphasis added). In the typical F.E.L.A. case, there is no dispute as to whether the injured or deceased person was an employee, and this language need not be included except to make the instruction more readable. However, when there is such a dispute in the case, the term "employee" must be defined. The definition must be carefully tailored to the specific factual question presented, and it is recommended that RESTATEMENT (SECOND) OF AGENCY (1958) be used as a guide in a manner consistent with the federal authorities. *See Kelley v. Southern Pacific Company*, 419 U.S. 318, 324 (1974) (discussion of RESTATEMENT (SECOND) OF AGENCY (1958) as authoritative concerning meaning of "employee" and "employed" under F.E.L.A., and as source of proper jury instruction).

5. It may be argued the plaintiff was not acting within the scope of his or her railroad employment at the time of the incident. If there is a question whether the employee was within the scope of employment, paragraph First should provide as follows:

> First, [plaintiff] [(name of decedent)] was an employee of defendant [(name of defendant)] acting within the scope of (his) (her) employment at the time of (his) (her) [injury] [death] [(describe the incident alleged to have caused injury or death)], and

If this paragraph is included, the term "scope of employment" must be defined in relation to the factual issue in the case. The RESTATEMENT (SECOND) OF AGENCY (1958) is recognized as a guide. *Wilson v. Chicago, Milwaukee, St. Paul and Pac. R. Co.*, 841 F.2d 1347, 1352 (7th Cir. 1988). In rare cases it may be argued that the duties of the employee did not affect interstate commerce and thus are not covered by the Act. Usually if the employee was acting within the scope and course of his employment for the railroad his conduct will be sufficiently connected to interstate commerce to be included within the Act.

6. The Boiler Inspection Act language of 49 U.S.C. § 2701, formerly 45 U.S.C. § 23, refers to the "locomotive or tender and its parts and appurtenances." The court should select the term which conforms to the case. The court may choose to specifically identify the specific part or appurtenance of the locomotive, boiler or tender in a case in which mere reference to the locomotive, boiler or tender will not adequately present the theory of violation.

7. Counsel should draft a concise statement of the Boiler Inspection Act violation alleged which is simple and free of unnecessary language. Examples which might be sufficient for a Boiler Act violation are: "in that there was oil on the locomotive catwalk;" or "in that the ladder on the locomotive was bent;" or "in that the grab iron on the locomotive was loose."

The Secretary of Transportation is authorized to establish standards for equipment covered under the Boiler Inspection Act and the Safety Appliance Act. *Shields v. Atlantic Coast Line R. Co.*, 350 U.S. 318, 320-25 (1956); *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 486 (1943).

Regulations promulgated pursuant to this authority are found in Title 49 of the Code of Federal Regulations under the Federal Railroad Administration (FRA) regulations. FRA regulations "acquire[] the force of law and become[] an integral part of the Act . . . ." *Lilly*, 317 U.S. at 488. Such regulations have "the same force as though prescribed in terms by the statute," *Atchison T. & S.F. Ry. Co. v. Scarlett*, 300 U.S. 471, 474 (1937), and violation of such regulations "are violations of the statute, giving rise not only to damage suits by those injured, but also to money penalties recoverable by the United States." *Urie v. Thompson*, 337 U.S. 163, 191 (1949) (citations omitted). If plaintiff's case is based on a violation of such a regulation, the plaintiff may request the court to replace Paragraph Second of the instruction with a paragraph submitting the regulation violation theory. *See Eckert v. Aliquippa & Southern R. Co.*, 828 F.2d 183, 187 (3d Cir. 1987).

8. Both the Boiler Inspection Act and the Safety Appliance Act require that the equipment at issue be "in use" at the time of the subject incident. The purpose of the "in use" element is to "exclude those injuries directly resulting from the inspection, repair or servicing of railroad equipment located at a maintenance facility." *Angell v. Chesapeake & O. Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Steer v. Burlington Northern, Inc.*, 720 F.2d 975, 976-77 (8th Cir. 1983).

Whether the equipment at issue is "in use" at the time of the subject incident is to be decided by the court as a question of law and not by the jury. *Pinkham v. Maine Cent. R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989) (citing *Steer*, 720 F.2d at 977 n.4). Because the "in use" element is a question of law for the court, this instruction does not submit the question to the jury.

Numerous reported cases discuss this element of the Boiler Inspection Act and Safety Appliance Act, and cases which construe the term "in use" under one act are authoritative for purposes of construing the term under the other act. *Holfester v. Long Island Railroad Company*, 360 F.2d 369, 373 (2d Cir. 1966). Any attempt to here represent the cases on point is beyond the scope of these Notes on Use, and counsel are referred to the authorities for further discussion of this element.

9. The same standard of "in whole or in part" causation which applies to general F.E.L.A. negligence cases prosecuted under 45 U.S.C. § 51 also applies to Boiler Inspection Act cases. *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 810 (6th Cir. 1985) (citing *Carter v. Atlantic & St. Andrews Bay Railway Co.*, 338 U.S. 430, 434 (1949)).

The defendant may request an instruction stating that if plaintiff's negligence was the sole cause of his injury, he may not recover under F.E.L.A. *New York Central R. Co. v. Marcone*, 281 U.S. 345, 350 (1930); *Meyers v. Union Pacific R. Co.*, 738 F.2d 328, 330-31 (8th Cir. 1984) (not error to instruct jury, "if you find that the plaintiff was guilty of negligence, and that the plaintiff's negligence was the sole cause of his injury, then you must return your verdict in favor of defendant"). Such a defense may also arise under the Boiler Inspection and Safety Appliance Acts. *See Beimert v. Burlington Northern, Inc.*, 726 F.2d 412, 414 (8th Cir.), *cert. denied*, 467 U.S. 1216 (1984).

F.E.L.A. Cases -- Element, Defense and Damage Instructions

Sole cause instructions have sometimes been criticized as unnecessary and as confusing. *See Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 883 n.1 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981); *Almendarez v. Atchison, T. & S.F. Ry. Co.*, 426 F.2d 1095, 1097 (5th Cir. 1970); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 826-27 (5th Cir. 1965). The Committee takes no position on whether a sole cause instruction should be given in an F.E.L.A. case. If the court decides to give a sole cause type instruction, the following may be appropriate:

> The phrase "in whole or in part" as used in [this instruction] [Instruction _____ (state the title or number of the plaintiff's elements instruction)] means that the railroad is responsible if [describe the alleged Boiler Inspection Act violation], if any, played any part, no matter how small, in causing the plaintiff's injuries. This, of course, means that the railroad is not responsible if any other cause, including plaintiff's own negligence, was solely responsible.*
>
> *This instruction may be given as a paragraph in the plaintiff's elements instruction or as a separate instruction.

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 507 (1957); *Page v. St. Louis Southwestern Ry.*, 349 F.2d 820, 826-27 (5th Cir. 1965).

As is the case with any model instruction, if the court determines that some other instruction on the subject is appropriate, such an instruction may be given.

10. This paragraph should not be used if Model Instruction 7.02A or 7.02B is given.

11. Use Model Instruction 7.02C, *infra*, to submit affirmative defenses.

7.05 F.E.L.A. SAFETY APPLIANCE ACT VIOLATION

Your verdict must be for plaintiff [and against defendant (name of defendant)][1] [on plaintiff's (identify claim represented in this elements instruction as "first," "second," etc.) claim][2] if all of the following elements have been proved by [the greater weight of the evidence] [a preponderance of the evidence][3]:

First, plaintiff [(name of decedent)] was an employee of defendant [(name of defendant)][4,5]

Second, (specify the alleged Safety Appliance Act violation),[6] and[7]

Third, the condition described in paragraph Second resulted in whole or in part[8] in [injury to plaintiff] [death to (name of decedent)].

If any of the above elements has not been proved by [the greater weight of the evidence] [a preponderance of the evidence], then your verdict must be for defendant [(name of defendant)].[9]

[Your verdict must be for defendant if you find in favor of defendant under Instruction ____ (insert number or title of affirmative defense instruction)].[10]

Committee Comments

The Introduction To Section 7 discusses the relationship among the Boiler Inspection Act (formerly 45 U.S.C. §§ 22-23, recodified 49 U.S.C. §§ 20102, 20701), the Safety Appliance Act (formerly 45 U.S.C. §§ 1-16, recodified 49 U.S.C. §§ 20301-20304, 21302, 21304), and the F.E.L.A., 45 U.S.C. § 51, *et seq.*

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim represented in this elements instruction is made.

2. Include this phrase and identify the claim represented in this elements instruction as "first," "second," etc., only if more than one claim is to be submitted.

3. Use the phrase which conforms to the burden of proof instruction, Model Instruction 3.04, *infra*.

4. The F.E.L.A. provides that the railroad "shall be liable in damages to any person suffering injury *while he is employed* by such carrier . . . ." 45 U.S.C. § 51 (1939) (emphasis added). In the typical F.E.L.A. case, there is no dispute as to whether the injured or deceased person was an

employee, and this language need not be included except to make the instruction more readable. However, when there is such a dispute in the case, the term "employee" must be defined. The definition must be carefully tailored to the specific factual question presented, and it is recommended that RESTATEMENT (SECOND) OF AGENCY (1958) be used as a guide in a manner consistent with the federal authorities. *See Kelley v. Southern Pacific Company*, 419 U.S. 318, 324 (1974) (discussion of RESTATEMENT (SECOND) OF AGENCY (1958) as authoritative concerning meaning of "employee" and "employed" under the F.E.L.A. and as source of proper jury instruction).

5. It may be argued the plaintiff was not acting within the scope of his or her railroad employment at the time of the incident. If there is a question whether the employee was within the scope of employment, paragraph First should provide as follows:

> First, [plaintiff] [(name of decedent)] was an employee of defendant [(name of defendant)] acting within the scope of (his) (her) employment at the time of (his) (her) [injury] [death] [(describe the incident alleged to have caused injury or death)], and

If this paragraph is included, the term "scope of employment" must be defined in relation to the factual issue in the case. The RESTATEMENT (SECOND) OF AGENCY (1958) is recognized as a guide. *Wilson v. Chicago, Milwaukee, St. Paul and Pac. R. Co.*, 841 F.2d 1347, 1352 (7th Cir. 1988). In rare cases it may be argued that the duties of the employee did not affect interstate commerce and thus are not covered by the Act. Usually if the employee was acting within the scope and course of his employment for the railroad his conduct will be sufficiently connected to interstate commerce to be included within the Act.

6. Counsel should draft a concise statement of the Safety Appliance Act violation alleged which is simple and free of unnecessary language. An example of a concise statement which might be sufficient in a case brought for violation of 49 U.S.C. § 20302(a)(2), formerly 45 U.S.C. § 4 (1988), is as follows: "Third, the grab iron at issue in the evidence was not secure, and . . . ."

The Secretary of Transportation is authorized to establish standards for equipment covered under the Boiler Inspection Act and the Safety Appliance Act. *Shields v. Atlantic Coast Line R. Co.*, 350 U.S. 318, 320-25 (1956); *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 486 (1943). Regulations promulgated pursuant to this authority are found in Title 49 of the Code of Federal Regulations under the Federal Railroad Administration (FRA) regulations. FRA regulations "acquire the force of law and become an integral part of the Act . . . ." *Lilly*, 317 U.S. at 488. Such regulations have "the same force as though prescribed in terms of the statute," *Atchison, T. & S. F. Ry. Co. v. Scarlett*, 300 U.S. 471, 474 (1937), and violation of such regulations "are violations of the statute, giving rise not only to damage suits by those injured, but also to money penalties recoverable by the United States." *Urie v. Thompson*, 337 U.S. 163, 191 (1949) (citations omitted). If plaintiff's case is based on a violation of such a regulation, the plaintiff may request the court to replace

Paragraph Second of the instruction with a paragraph submitting the regulation violation theory. *See Eckert v. Aliquippa & Southern R. Co.*, 828 F.2d 183, 187 (3d Cir. 1987).

7. Both the Boiler Inspection Act and the Safety Appliance Act require that the equipment at issue be "in use" at the time of the subject incident. The purpose of the "in use" element is to "exclude those injuries directly resulting from the inspection, repair or servicing of railroad equipment located at a maintenance facility." *Angell v. Chesapeake & O. Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Steer v. Burlington Northern, Inc.*, 720 F.2d 975, 976-77 (8th Cir. 1983).

Whether the equipment at issue is "in use" at the time of the subject incident is to be decided by the court as a question of law and not by the jury. *Pinkham v. Maine Cent. R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989) (citing *Steer*, 720 F.2d at 977). Because the "in use" element is a question of law for the court, this instruction does not submit the question to the jury.

Numerous reported cases discuss this element of the Boiler Inspection Act and Safety Appliance Act, and cases which construe the term "in use" under one act are authoritative for purposes of construing the term under the other act. *Holfester v. Long Island Railroad Co.*, 360 F.2d 369, 373 (2d Cir. 1966). Any attempt to here represent the cases on point is beyond the scope of these Notes on Use, and counsel are referred to the authorities for further discussion of this element.

8. The standard of "in whole or in part" causation which applies to general F.E.L.A. negligence cases is the standard of causation which applies to F.E.L.A. cases premised upon violation of the Safety Appliance Act. "Once this violation is established, only causal relation is an issue. And Congress has directed liability if the injury resulted 'in whole or in part' from defendant's negligence or its violation of the Safety Appliance Act." *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434-35 (1949).

The defendant may request an instruction stating that if plaintiff's negligence was the sole cause of his injury, he may not recover under the F.E.L.A. *New York Central R. Co. v. Marcone*, 281 U.S. 345, 350 (1930); *Meyers v. Union Pacific R.R. Co.*, 738 F.2d 328, 330-31 (8th Cir. 1984) (not error to instruct jury, "if you find that the plaintiff was guilty of negligence, and that the plaintiff's negligence was the sole cause of his injury, then you must return your verdict in favor of defendant"). Such a defense may also arise under the Boiler Inspection and Safety Appliance Acts. *See Beimert v. Burlington Northern, Inc.*, 726 F.2d 412, 414 (8th Cir. 1984).

Sole cause instructions have sometimes been criticized as unnecessary and as confusing. *See Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 883-84 n.1 (8th Cir. 1980); *Almendarez v. Atchison, T. & S.F. Ry. Co.*, 426 F.2d 1095, 1097 (5th Cir. 1970); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 826-27 (5th Cir. 1965). The Committee takes no position on whether a sole cause instruction should be given in an F.E.L.A. case. If the court decides to give a sole cause type instruction, the following may be appropriate:

> The phrase "in whole or in part" as used in [this instruction] [Instruction ___ (state the title or number of the plaintiff's elements instruction)] means that the railroad is responsible if [describe the alleged Safety Appliance Act violation], if any, played any part, no matter how small, in causing the plaintiff's injuries. This, of course, means that the railroad is not responsible if any other cause, including plaintiff's own negligence, was solely responsible.*
>
> *This instruction may be given as a paragraph in the plaintiff's elements instruction or as a separate instruction.

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 507 (1957); *Page v. St. Louis Southwestern Ry.*, 349 F.2d 820, 826-27 (5th Cir. 1965).

As is the case with any model instruction, if the court determines that some other instruction on the subject is appropriate, such an instruction may be given.

9. This paragraph should not be used if Model Instruction 7.02A or 7.02B is given.

10. Use Model Instruction 7.02C, *infra*, to submit affirmative defenses.

F.E.L.A. Cases -- Element, Defense and Damage Instructions

7.06A F.E.L.A. DAMAGES - INJURY TO EMPLOYEE

If you find in favor of plaintiff, then you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)][1] of the evidence will fairly and justly compensate plaintiff for any damages you find plaintiff sustained [and is reasonably certain to sustain in the future][2] as a direct result of the occurrence mentioned in the evidence.[3] [You should consider the following elements of damages:[4]

1. The physical pain and (mental) (emotional) suffering plaintiff has experienced (and is reasonably certain to experience in the future); the nature and extent of the injury, whether the injury is temporary or permanent (and whether any resulting disability is partial or total), (including any aggravation of a pre-existing condition);
2. The reasonable expense of medical care and supplies reasonably needed by and actually provided to the plaintiff to date (and the present value of reasonably necessary medical care and supplies reasonably certain to be received in the future);
3. The earnings plaintiff has lost to date (and the present value of earnings plaintiff is reasonably certain to lose in the future);[5]
4. The reasonable value of household services which plaintiff has been unable to perform for (himself) (herself) to date (and the present value of household services plaintiff is reasonably certain to be unable to perform for (himself) (herself) in the future).][6, 7]

[Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][8] [You may not include in your award any sum for court costs or attorneys' fees.][9]

[If you assess a percentage of negligence to plaintiff by reason of Instruction ___ (state the title or number of the contributory negligence instruction),[10] do not diminish the total amount of damages by the percentage of negligence you assess to plaintiff. The court will do this.][11]

Committee Comments

This Instruction should be used to submit damages issues in cases in which the employee's injuries were not fatal. Model Instruction 7.06B, *infra*, should be used in cases in which the employee's injuries were fatal.

The final paragraph of this instruction tells the jury that the court will diminish the total amount of damages in proportion to the amount of contributory negligence found. This instruction

is consistent with the Form of Verdict 7.08 which requires the jury to assess plaintiff's total damages and plaintiff's percentage of contributory negligence. If contributory negligence is not submitted, the final paragraph of 7.06A should be eliminated. Also, it should be eliminated for claims submitted under the Boiler Inspection Act and the Safety Appliance Act.

Notes on Use

1. Use the phrase which conforms to the burden of proof instruction, Model Instruction 3.04, *infra*.

2. Include this language if the evidence supports a submission of any item of future damage.

3. The language "as a direct result of the occurrence mentioned in the evidence" should be deleted and replaced whenever there is evidence tending to prove that the employee suffered the subject injuries in an occurrence other than the one upon which the railroad's liability is premised. In such cases, the language "as a result of the occurrence mentioned in the evidence" should be replaced with a concise description of the occurrence upon which the railroad's liability is premised. An example of such a case is one in which the plaintiff alleges that his injuries were suffered in a fall at the work place, and the railroad claims the injuries were suffered in a car accident which was not job related. The following would be appropriate language to describe the occurrence upon which liability is premised: "as a direct result of the fall on (the date of the fall)."

4. This list of damages is optional and is intended to include those items of damage for which recovery is commonly sought in the ordinary F.E.L.A. case. This list is not intended to exclude any item of damages which is supported in evidence and the authorities. *If the court elects to list items of damage in the damages instruction, there must, of course, be evidence to support each item listed*.

5. For the relationship between lost future earnings and lost earning capacity, *see Gorniack v. National R. Passenger Corp.*, 889 F.2d 481, 483-84 (3d Cir. 1989); *DeChico v. Metro-North Commuter RR*, 758 F.2d 856, 861 (2d Cir. 1985); *Wiles v. New York, Chicago & St. Louis Railroad Co.*, 283 F.2d 328, 331-32 (3d Cir.), *cert. denied*, 364 U.S. 900 (1960); *Downie v. United States Lines Co.*, 359 F.2d 344, 347 (3d Cir. 1966) (if permanent injuries result in impairment of earning capacity, plaintiff is entitled to reimbursement for such impairment including, but not limited to, probable loss of future earnings). If the court determines that the case is one in which the jury should be instructed on the distinction between loss of future earnings and loss of earning capacity, this model instruction may be modified accordingly. Otherwise, such issue can be left to argument. Situations in which this distinction arises may be rare.

6. The reasonable value of household services which the injured employee is unable to perform for himself or herself is a compensable item of pecuniary damages. *See Cruz v. Hendy Intern. Co.*, 638 F.2d 719, 723 (5th Cir. 1981) (case decided under the Jones Act, 46 U.S.C. § 688

(1982), which specifically incorporates the F.E.L.A. and where it was stated that the plaintiff may recover "the cost of employing someone else to perform those domestic services that he would otherwise have been able to render but is now incapable of doing."); *cf. Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 475 (8th Cir. 1977).

7. If the evidence supports a charge that the plaintiff has failed to mitigate his or her damages, the following paragraph should be included after the last listed item of damage, or after the general damage instruction paragraph if the court chooses not to list items of damage:

> If you find that defendant has proved by [the greater weight of the evidence] [a preponderance of the evidence] that plaintiff has failed to take reasonable steps to minimize (his) (her) damages, then your award must not include any sum for any amount of damage which you find plaintiff might reasonably have avoided by taking such steps.

In *Kauzlarich v. Atchison, Topeka & Santa Fe Ry. Co.*, 910 S.W.2d 254 (Mo. banc 1995), it was held to be reversible error to refuse to give the railroad's proposed mitigation instruction that "closely follow[ed]" the above instruction. *Id.* at 256. The court held that as a matter of federal substantive law, the railroad was entitled to a mitigation instruction when there was evidence to support it. *Id.* at 258. The burden of pleading and proving failure to mitigate is on the defendant. *Sayre v. Musicland Group, Inc.*, 850 F.2d 350, 355-56 (8th Cir. 1988); *Modern Leasing v. Falcon Mfg. of California*, 888 F.2d 59, 62 (8th Cir. 1989).

8. / 9. These instructions may also be added.

10. *See infra* Model Instruction 7.03. Note that contributory negligence may not be submitted for claims alleging violation of the Boiler Inspection Act or Safety Appliance Act.

11. If Model Instruction 7.08, *infra*, Form of Verdict, is used, then this paragraph must be given because contributory negligence is submitted. If the alternative Form of Verdict set out in Committee Comments to 7.08 is used, this paragraph should not be used.

7.06B F.E.L.A. DAMAGES - DEATH OF EMPLOYEE

If you find in favor of plaintiff, then you must award plaintiff such sum as you find by the [(greater weight) or (preponderance)][1] of the evidence will fairly and justly compensate [here identify the beneficiaries][2] for (his, her, their) damages which can be measured in money which you find (he, she, they) sustained as a direct result of the death of (name of decedent).[3] [You should consider the following elements of damages:[4]

1. The reasonable value of any money, goods and services that (name of decedent) would have provided (name of beneficiaries) had (name of decedent) not died on (date of death). [These damages include the monetary value of (name of child beneficiaries)'s loss of any care, attention, instruction, training, advice and guidance from (name of decedent).][5]

2. Any conscious pain and suffering you find from the evidence that (name of decedent) experienced as a result of [his] [her] injuries.[6]

3. The reasonable expense of medical care and supplies reasonably needed by and actually provided to (name of decedent).][6]

Your award must not include any sum for grief or bereavement or the loss of society or companionship.[7]

Any award you make for the value of any money and services which you find from the evidence that (name of decedent) would have provided (name of each beneficiary) in the future should be reduced to present value. Any award you make for the value of any money and services you find from the evidence that (name of decedent) would have provided (name of beneficiary) between the date of [his] [her] death on (date of death) and the present should not be reduced to present value.[8]

[Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][9] [You may not include in your award any sum for court costs or attorneys' fees.][10]

[If you assess a percentage of negligence to (name of decedent) by reason of Instruction ____ (state the number of the contributory negligence instruction),[11] do not diminish the total amount of damages by the percentage of negligence you assess to (name of decedent). The court will do this.][12]

F.E.L.A. Cases -- Element, Defense and Damage Instructions

Committee Comments

This instruction should be used to submit damages in cases in which the employee's injuries were fatal. Model Instruction 7.06A, *infra*, should be used in cases in which the employee's injuries were not fatal.

The final paragraph of this instruction tells the jury that the court will diminish the total amount of damages in proportion to the amount of contributory negligence found. This instruction is consistent with Form of Verdict 7.08 which requires the jury to assess plaintiff's total damages and decedent's percentage of contributory negligence. If contributory negligence is not submitted the final paragraph of 7.06B should be eliminated. Also, it should be eliminated for claims submitted under the Boiler Inspection Act and the Safety Appliance Act.

Notes on Use

1. Use the phrase which conforms to the burden of proof instruction, Model Instruction 3.04, *infra*.

2. A death action under the F.E.L.A. is brought by a personal representative, as plaintiff, for the benefit of specific beneficiaries. The personal representative brings the action "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, ..." 45 U.S.C. § 51 (1939).

3. *See* 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 128.30 (5th ed. 2000). Damages in an F.E.L.A. death action "are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries." *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 70 (1913). "No hard and fast rule by which pecuniary damages may in all cases be measured is possible . . . . The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, ..." *Id.*, 227 U.S. at 72; *cf. Norfolk & Western R. Co. v. Holbrook*, 235 U.S. 625, 629 (1915).

4. This list of damages is optional and is intended to include those items of damage for which recovery is commonly sought in the ordinary F.E.L.A. case. This list is not intended to exclude any item of damages which is supported in evidence and the authorities. *If the court elects to list items of damage in the damages instruction, there must, of course, be evidence to support each item listed*.

5. In an F.E.L.A. death case, recovery is limited to pecuniary losses. The items specified in the bracketed sentence have been deemed pecuniary losses in the case of a child beneficiary. The recovery may be different in the case of a spouse, parent or an adult child. *Michigan Central R. Co.*

v. Vreeland, 227 U.S. 59, 70 (1913); *Norfolk & Western R. Co. v. Holbrook*, 235 U.S. 625, 629 (1915); *Kozar v. Chesapeake and Ohio Railway Co.*, 449 F.2d 1238, 1243 (6th Cir. 1971).

6. The items of damage set forth in paragraphs 2 and 3 are recoverable by the personal representative on behalf of the spouse, children or parents of the decedent, if supported by the evidence. If the claim is brought by the personal representative on behalf of next of kin other than the spouse, children or parents, then dependency upon decedent must be shown, and the instructions will require modification to submit that issue to the jury. The elements instruction might be modified to submit the dependency issue. 45 U.S.C. § 59 (1910); *Auld v. Terminal R.R. Assoc. of St. Louis*, 463 S.W.2d 297 (Mo. 1970), *cert. denied*, 401 U.S. 940 (1971); *Jensen v. Elgin, Joliet & Eastern R. Co.*, 24 Ill.2d 383, 182 N.E.2d 211 (1962).

Funeral expenses may not be included in damages awarded in F.E.L.A. actions under either a 45 U.S.C. § 51 death action or a 45 U.S.C. § 59 survival action. *Philadelphia & R.R. v. Marland*, 239 Fed. 1, 11 (3d Cir. 1917), *cert. denied*, 245 U.S. 671 (1918); *DuBose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026, 1033 (5th Cir.), *cert. denied*, 469 U.S. 854 (1984); *Heffner v. Pennsylvania R.R. Co.*, 81 F.2d 28, 31 (2d Cir. 1936); *Frabutt v. New York C. & St. L. R.R.*, 84 F. Supp. 460, 467 (W.D. Pa. 1949).

7. *Michigan Central R. v. Vreeland*, 227 U.S. 59, 70 (1913).

8. Future pecuniary benefits in an F.E.L.A. death case should be awarded at present value. *Chesapeake & O.R. Co. v. Kelly*, 241 U.S. 485, 489-90 (1916); *cf. St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985).

9. / 10. These instructions may also be added.

11. Model Instruction 7.03, *infra*, submits the issue of contributory negligence.

12. If Model Instruction 7.08, *infra*, Form of Verdict, is used, then this paragraph must be given when contributory negligence is submitted. If the alternative Form of Verdict set out in Committee Comments to 7.08 is used, this paragraph should not be used.

7.06C F.E.L.A. DAMAGES - PRESENT VALUE OF FUTURE LOSS

If you find that plaintiff is reasonably certain to lose [earnings in the future] [or to incur medical expenses in the future], then you must determine the present value in dollars of such future damage, since the award of future damages necessarily requires that payment be made now in one lump sum and plaintiff will have the use of the money now for a loss that will not occur until some future date. You must decide what those future losses will be and then make a reasonable adjustment for the present value.

Committee Comments

In an F.E.L.A. case "an utter failure to instruct the jury that present value is the proper measure of a damage award is error." *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 412 (1985); *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 339-40 (1988). If requested, such an instruction must be given. However, "no single method for determining present value is mandated by federal law." *Dickerson*, 470 U.S. at 412. *See also Beanland v. Chicago, Rock Island & Pacific Railroad*, 480 F.2d 109, 114-15 (8th Cir. 1973); 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 128.20 (5th ed. 2000).

Only future economic damages are to be reduced to present value. Past economic damages and future noneconomic damages are not to be reduced to present value. *See Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 489 (1916).

In *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 885 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), the court stated that the jury should not be instructed to reduce damages for future pain and suffering to present value.

This Instruction contemplates that the court will allow evidence and jury argument about the proper method for calculating present value. If additional instruction on the definition of present value or factors to be considered is deemed appropriate, *see*, *e.g.*, *Fifth Circuit Pattern Jury Instructions - Civil*, Instruction 15.3(c) (West 1998); and *Arkansas Model Jury Instructions-AMI Civil 3d*, AMI 2219 (1989).

7.06D F.E.L.A. DAMAGES - INCOME TAX EFFECTS OF AWARD

The plaintiff will not be required to pay any federal or state income taxes on any amount that you award.

[When calculating lost earnings, if any, you should use after-tax earnings.][1]

Committee Comments

If requested, the jury must be instructed that the verdict will not be subject to income taxes. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 498 (1980); *Gander v. FMC Corp.*, 892 F.2d 1373, 1381 (8th Cir. 1990); *Paquette v. Atlanska-Plovidba*, 701 F.2d 746, 748 (8th Cir. 1983). Furthermore, the Supreme Court in *Norfolk & Western Ry. Co. v. Liepelt*,, stated that the jury should base its award on the "after-tax" value of lost earnings in determining lost earnings. The Court stated:

> The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of ability to support his family.

444 U.S. at 493.

Notes on Use

1. This sentence should be given if there is evidence of both gross and net earnings and there is any danger that the jury may be confused as to the proper measure of damages.

7.07 (Reserved for Future Use)

7.08 FORM OF VERDICT - CONTRIBUTORY NEGLIGENCE SUBMITTED

VERDICT[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim[2] of plaintiff [(name of plaintiff)] against defendant [(name of defendant)], we, the jury find in favor of:

_____

Plaintiff [(name of plaintiff)] or Defendant [(name of defendant)]

Note: Complete the next paragraph only if the above finding is in favor of plaintiff.

We, the jury, assess the total damages of plaintiff [(name of plaintiff)] at $_____. DO NOT REDUCE THIS AMOUNT BY THE PERCENTAGE OF NEGLIGENCE, IF ANY, YOU FIND IN THE NEXT QUESTION.

Note: If you do not assess a percentage of negligence to [plaintiff] [(name of decedent)] under Instruction _____ (state the number or title of the contributory negligence instruction), then write "0" (zero) in the blank in the following paragraph. If you do assess a percentage of negligence to [plaintiff] [(name of decedent)] by reason of Instruction _____ (state the number or title of contributory negligence instruction), then write the percentage of negligence in the blank in the following paragraph. The court will then reduce the total damages you assess above by the percentage of negligence you assess to [plaintiff] [(name of decedent)].

We, the jury, find [plaintiff] [(name of decedent)] to be _____% negligent.

Committee Comments

This form of verdict can be used in F.E.L.A. negligence cases when contributory negligence is submitted. In F.E.L.A. cases where contributory negligence is not submitted and in Boiler Inspection Act and Safety Appliance Act cases use Form of Verdict 7.08A.

In cases in which the issue of contributory negligence has been submitted to the jury, and the jury has been instructed to make findings on the issues of contributory negligence and damages, there is a question whether the jury or the court should perform the computations which reduce the total damages by the percentage of contributory negligence found. The plain language of 45 U.S.C. § 53 (1908) is that "the damages shall be diminished *by the jury* . . . ." (Emphasis added.) This

Committee is not aware of any case specifically prohibiting a form of verdict which allows the jury to determine the percentage of plaintiff's negligence and permits the court to perform the mathematical calculation. State jurisdictions such as Arkansas and Missouri, and some federal courts, instruct the jury to reduce the total damage award by the percentage of contributory negligence before rendering a general verdict for the reduced amount of total damages. *Wilson v. Burlington Northern, Inc.*, 670 F.2d 780, 782-83 n.1 (8th Cir.), *cert. denied*, 457 U.S. 1120 (1982) (jury instructed to perform contributory negligence reduction computation and to return general verdict for damage award in reduced amount); *note* 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil §§ 106.12, 106.13, 106.14 (5th ed. 2000).

Another means to the same result is for the jury to separately set forth the percentage of contributory negligence and the total amount of damages without reduction for contributory negligence. With this information the court will perform the contributory negligence damage reduction calculation in arriving at its judgment. This may be done by means of a special verdict. F.R.C.P. 49(a); *Wattigney v. Southern Pacific Company*, 411 F.2d 854, 856 (5th Cir. 1969); 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil §§ 106.12, 106.13, 106.14 (5th ed. 2000). This may also be done by means of a general verdict accompanied by special interrogatories. F.R.C.P. 49(b); *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 884 (8th Cir. 1980).

If the court wants the jury to reduce the damages by a monetary amount because of contributory negligence, the following instruction may be used:

VERDICT[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim[2] of plaintiff [(name of plaintiff)] against defendant [(name of defendant)], we, the jury, find in favor of:

_____

Plaintiff [(name of plaintiff)] Defendant [(name of defendant)]

Note: Complete the following paragraph only if the above finding is in favor of plaintiff. [If you assess a percentage of negligence to (name of decedent) (plaintiff) by reason of Instruction ___ (state the name of the contributory negligence instruction), then you must reduce the total amount of damages by the percentage of negligence you assess to (name of decedent) (plaintiff).]

We, the jury, assess the damages of plaintiff [(name of plaintiff)] at $_____.

F.E.L.A. Cases -- Element, Defense and Damage Instructions

By using the recommended Form of Verdict 7.08, the trial court and counsel can determine whether the jury has found the plaintiff to be contributorily negligent, and if so, the percentage of fault attributed to plaintiff. When a general form of verdict is used, the record will not show what determinations were made on this issue and it also will be impossible to determine the amount of total damages determined by the jury before reduction for any contributory negligence. Furthermore, by using 7.08, a court which reviews the verdict on appeal will be able to determine what the jury decided on these issues, and in certain cases this may avoid the necessity of a retrial. For example, assume that a jury finds for plaintiff and assesses his total damages at $100,000 but finds plaintiff 50% contributorily negligent. Assume further that on appeal it is held that defendant failed to make a submissible case on plaintiff's contributory negligence and that it was error to submit this issue to the jury. If 7.08 were used in this hypothetical case, the appellate court could simply reverse and enter judgment for plaintiff in the amount of $100,000. *See Dixon v. Penn Central Company*, 481 F.2d 833 (6th Cir. 1973). If, however, a general form of verdict were used, the appellate court would be unable to determine whether the jury had found no negligence on the part of the plaintiff and evaluated his damages at $50,000 or found plaintiff 90% negligent and evaluated his damages at $500,000. The appellate court would have no choice but to remand the case for a new trial.

In addition, it is believed that the use of Form of Verdict 7.08 is more likely to produce a jury verdict that is proper and consistent with the court's instructions. 7.08 directs the jury's attention to the proper issues in the proper order, and makes it possible for the court and counsel to confirm that the jury has followed the instructions in this regard.

Notes on Use

1. When more than one claim is submitted, a jury decision is required on each claim.

Although the employee may bring claims for negligence as well as claims for violation of the Safety Appliance Act or Boiler Inspection Act in the same case, the employee is entitled to only one recovery for his or her damages.

2. If more than one claim is submitted in the same lawsuit, the claims should be separately identified in the verdict form. *See infra* Model Instruction 4.60.

7.08A FORM OF VERDICT - CONTRIBUTORY NEGLIGENCE NOT SUBMITTED

VERDICT[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim[2] of plaintiff [(name of plaintiff)] against defendant [(name of defendant)], we, the jury find in favor of:

_____

Plaintiff [(name of plaintiff)] Defendant [(name of defendant)]

Note: Complete the next paragraph only if the above finding is in favor of plaintiff.

We, the jury, assess the total damages of plaintiff [(name of plaintiff)] at $_____.

Committee Comments

This form of verdict should be used in F.E.L.A. negligence cases when contributory negligence is not submitted. Also, it is to be used in Boiler Inspection Act and Safety Appliance Act cases.

Notes on Use

1. When more than one claim is submitted, a jury decision is required on each claim.

Although the employee may bring claims for negligence as well as claims for violation of the Safety Appliance Act or Boiler Inspection Act in the same case, the employee is entitled to only one recovery for his or her damages.

2. If more than one claim is submitted in the same lawsuit, the claims should be separately identified in the verdict form. *See infra* Model Instruction 4.60.

7.09 DEFINITION OF TERM "NEGLIGENT" OR "NEGLIGENCE"

The term "negligent" or "negligence" as used in these Instructions means the failure to use that degree of care which an ordinarily careful person would use under the same or similar circumstances. [The degree of care used by an ordinarily careful person depends upon the circumstances which are known or should be known and varies in proportion to the harm that person reasonably should foresee. In deciding whether a person was negligent you must determine what that person knew or should have known and the harm that should reasonably have been foreseen.]

Committee Comments

When the term "negligent" or "negligence" is used, it must be defined. *Note infra* Model Instruction 7.10 (definition of term "ordinary care"); *note also infra* Model Instruction 7.11 (combined definition of terms "ordinary care" and "negligent" or "negligence").

Concerning the bracketed language, in order for the railroad to be found negligent under the F.E.L.A., the jury must find that the railroad either knew or should have known of the condition or circumstance which is alleged to have caused the employee's injury or death. This is referred to as the notice requirement. *See Siegrist v. Delaware, Lackawanna & Western R. Co.*, 263 F.2d 616, 619 (2d Cir. 1959) (referring to the "doctrine of notice"). Closely related to the notice requirement is the "essential ingredient" of reasonable foreseeability of harm. *Gallick v. Baltimore & Ohio Railway Co.*, 372 U.S. 108, 117 (1963). Given the actual or constructive notice of the condition or circumstance alleged to have caused injury, "defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances." *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir.), *cert. denied*, 429 U.S. 1002 (1976). Thus, "the ultimate question of fact is whether the railroad exercised reasonable care" and this involves "the question whether the railroad had notice of any danger." *Bridger v. Union Ry, Co.*, 355 F.2d 382, 389 (6th Cir. 1966).

The bracketed language of this instruction instructs the jury on notice and reasonable foreseeability of harm. *See Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 (1943); *Chicago & North Western Railway Company v. Rieger*, 326 F.2d 329, 335 (8th Cir. 1964); W. Mathes, *Jury Instructions and Forms for Federal Civil Cases*, 28 F.R.D. 401, 495 (1962). The bracketed language may be included even when defendant instructs on this issue in Model Instruction 7.02B, *infra*.

7.10 DEFINITION OF THE TERM "ORDINARY CARE"

The phrase "ordinary care" as used in these Instructions means that degree of care that an ordinarily careful person would use under the same or similar circumstances. [The degree of care used by an ordinarily careful person depends upon the circumstances which are known or should be known and varies in proportion to the harm that person reasonably should foresee. In deciding whether a person exercised ordinary care you must consider what that person knew or should have known and the harm that should reasonably have been foreseen.]

Committee Comments

When the phrase "ordinary care" is used, it must be defined. *Note infra* Model Instruction 7.09 (definition of term "negligent" or "negligence"); *note also infra* Model Instruction 7.11 (combined definition of terms "ordinary care" and "negligent" or "negligence").

Concerning the bracketed language, in order for the railroad to be found negligent under the F.E.L.A., the jury must find that the railroad either knew or should have known of the condition or circumstance which is alleged to have caused the employee's injury or death. This is referred to as the notice requirement. *See Siegrist v. Delaware, Lackawanna & Western R. Co.*, 263 F.2d 616, 619 (2d Cir. 1959) (referring to the "doctrine of notice"). Closely related to the notice requirement is the "essential ingredient" of reasonable foreseeability of harm. *Gallick v. Baltimore & Ohio Railway Company*, 372 U.S. 108, 117 (1963). Given the actual or constructive notice of the condition or circumstance alleged to have caused injury, "defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances." *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir.), *cert. denied*, 429 U.S. 1002 (1976). Thus, "the ultimate question of fact is whether the railroad exercised reasonable care" and this involves "the question whether the railroad had notice of any danger." *Bridger v. Union Railway Company*, 355 F.2d 382, 389 (6th Cir. 1966).

The bracketed language of this instruction instructs the jury on notice and reasonable foreseeability of harm. *See Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 (1943); *Chicago & North Western Railway Company v. Rieger*, 326 F.2d 329, 335 (8th Cir. 1964); W. Mathes, *Jury Instructions and Forms for Federal Civil Cases*, 28 F.R.D. 401, 495 (1962). The bracketed language may be included even when defendant instructs on this issue in Model Instruction 7.02B, *infra*.

7.11 DEFINITIONS OF THE TERMS "NEGLIGENT" OR "NEGLIGENCE" AND "ORDINARY CARE" COMBINED

The term "negligent" or "negligence" as used in these Instructions means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances. [The degree of care used by an ordinarily careful person depends upon the circumstances which are known or should be known and varies in proportion to the harm that person reasonably should foresee. In deciding whether a person was negligent or failed to use ordinary care you must consider what that person knew or should have known and the harm that should reasonably have been foreseen.]

Committee Comments

Whenever the term "negligent" or "negligence" or the term "ordinary care" is used in these instructions, it must be defined. When these terms each appear in the same set of instructions, this instruction may be used as an alternative to submitting *infra* Model Instruction 7.09 ("negligent" or "negligence") and Model Instruction 7.10 ("ordinary care") individually.

Concerning the bracketed language, in order for the railroad to be found negligent under the F.E.L.A., the jury must find that the railroad either knew or should have known of the condition or circumstance which is alleged to have caused the employee's injury or death. This is referred to as the notice requirement. *See Siegrist v. Delaware, Lackawanna & Western R. Co.*, 263 F.2d 616, 619 (2d Cir. 1959) (referring to the "doctrine of notice"). Closely related to the notice requirement is the "essential ingredient" of reasonable foreseeability of harm. *Gallick v. Baltimore & Ohio Railway Company*, 372 U.S. 108, 117 (1963). Given the actual or constructive notice of the condition or circumstance alleged to have caused injury, "defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances." *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir.), *cert. denied*, 429 U.S. 1002 (1976). Thus, "the ultimate question of fact is whether the railroad exercised reasonable care" and this involves "the question whether the railroad had notice of any danger." *Bridger v. Union Railway Company*, 355 F.2d 382, 389 (6th Cir. 1966).

The bracketed language of this instruction instructs the jury on notice and reasonable foreseeability of harm. *See Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 (1943); *Chicago & North Western Railway Company v. Rieger*, 326 F.2d 329, 335 (8th Cir. 1964); W. Mathes, *Jury Instructions and Forms for Federal Civil Cases*, 28 F.R.D. 401, 495 (1962). The bracketed language may be included even when defendant instructs on this issue in Model Instruction 7.02B, *infra*.

8. DEFINITIONS

Definitions

8.01 AGENCY

A corporation acts only through its agents or employees and any agent or employee of a corporation may bind the corporation by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation, or within the scope of [his/her] duties as an employee of the corporation.

Committee Comments

This instruction is a modification of 3 Kevin F. O'Malley, et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 108.01 (5th ed. 2000).

The authority of an agent to speak for the principal may vary from state to state and differ from federal law.